The First Circuit's reliance on the earlier-enacted statute conflicts with the decisions of several courts of appeals and of this Court concerning how a court should determine whether a statute was enacted for a discriminatory purpose. If permitted to stand, the First Circuit's approach would allow states to enact discriminatory laws with impunity as long as the statute being amended contains an innocuous statement of purpose. Review by this Court is plainly warranted.

A. Motor Vehicle Warranty Repair Programs

The relationship between a motor vehicle manufacturer and a motor vehicle dealer is governed by a written franchise agreement. One issue addressed in these agreements is the dealers' provision of repair services under the warranties that manufacturers provide to automobile purchasers. Standard motor vehicle franchise agreements obligate dealers to perform warranty repair work — whether or not they sold the vehicle to be serviced — and manufacturers promise to reimburse the dealers for this work. App., *infra*, 2a.

The two principal variables that determine the compensation paid by manufacturers to dealers for warranty service are the cost of parts and the cost of labor. The cost of labor is further divided into an hourly labor rate component and a time component — *i.e.*, the amount of time required to complete a specified repair. The method for calculating the costs of warranty parts, the hourly labor rate, and the method for establishing the time for a particular repair are all specified in the franchise agreements between manufacturers and dealers. See Declaration of Paul Barry ¶ 6, CAJA 165.[1]

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[1] Some of the information developed in the district court is subject to a protective order because it involves trade secrets or proprietary business or financial information. Therefore, one volume of the multi-volume appendix filed in the court of appeals was filed under seal. Although this petition cites materials from the joint appendix, none of the protected materials are cited or disclosed.

B. Maine's Regulation Of Warranty Repair Reimbursements

Like many states, Maine regulates several aspects of the franchise relationship between motor vehicle dealers and manufacturers, including compensation for warranty repairs. The Maine legislature amended 10 M.R.S.A. § 1176 in 1991 to require motor vehicle manufacturers to reimburse Maine motor vehicle dealers for repairs performed under a motor vehicle's warranty at the dealers' "retail" rates for parts and labor customarily charged to non-warranty customers. App., *infra*, 3a.

In response to Maine's adoption of the retail rate reimbursement statute, Ford Motor Company imposed a price adjustment — called a "warranty parity surcharge" — on each new car sold to Maine dealers in an effort to recoup the increased cost to Ford of warranty repairs in the State of Maine compared to the cost of identical repairs in other states. *Ibid.* The surcharge was initially set at $160 per vehicle and rose over time to $500 per vehicle. When Maine motor vehicle dealers challenged this surcharge, the First Circuit determined that nothing in Maine law prohibited the surcharge. See *Acadia Motors, Inc.* v. *Ford Motor Co.*, 44 F.3d 1050, 1056-1057 (1st Cir. 1995).

Maine amended the motor vehicle franchise law in 1997. Among the changes was the addition of a statement of purpose — codified at 10 M.R.S.A. § 1182 — stating that the purpose of the motor vehicle franchise law is "to prevent frauds, impositions and other abuses against residents and to protect and preserve the economy, the investments of residents, the public safety and the transportation system of the State." The sole provision relating to warranty reimbursement in the 1997 amendments barred motor vehicle manufacturers from establishing independent warranty service centers in Maine, thereby conferring upon Maine dealers a monopoly

on warranty repair work. See 1997 Me. Laws ch. 521, § 25 (codified as the third paragraph of 10 M.R.S.A. § 1176).

Shortly after Ford's implementation of the Maine warranty surcharge and the First Circuit's decision upholding the legality of the surcharge, Maine motor vehicle dealers began to seek legislation prohibiting manufacturers from charging motor vehicle dealers in Maine a wholesale price higher than the price charged to dealers in other states. A bill prohibiting manufacturers from recovering the costs of warranty reimbursements — *i.e.*, a recoupment bar — was introduced in 1999 on behalf of the Maine Auto Dealers Association ("MADA").[2] See Legislative Document 1931, 119th Leg., 2d Reg. Sess. (1999). The Maine legislature eventually deleted the recoupment bar provision from LD 1931, and replaced it with a provision establishing a "Commission to Study the Most Effective Method of Providing Retail Rate Reimbursement for Parts and Labor." See 1999 Me. Laws ch. 766.

This Commission issued its report in December 2000; several Commission members "note[d] . . . the unfair advantage . . . to New Hampshire dealers who [were] not subject to the surcharge." App., *infra*, 8a. Moreover, "[the majority of the Commission] argue[d] that Maine dealers and consumers should not have to pay more than other buyers in other parts of the country." *Id.* at 8a-9a.[3] These statements were made in the course of recommending, among other things, the en-

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[2] MADA is composed of automobile dealers based in Maine in contrast to the members of the Alliance — none of whom has a physical presence in the State of Maine.

[3] The Commission member from Ford Motor Company was the only member of the Commission to dissent from the recommendation that Maine implement a recoupment bar. *Report of the Commission to Study the Most Effective Method of Providing Retail Rate Reimbursement for Parts and Labor*, 8 (2000), CAJA 42.

actment of a recoupment bar only in the event that negotiations between manufacturers and dealers fail to yield a compromise solution. *Id.* at 9a.

Over the next several years, the relevant committee of the Maine legislature — the Joint Standing Committee on Business, Research and Economic Development — twice passed compromise legislation that did not include a recoupment bar. *Ibid.* The first compromise bill, resulting from manufacturer-dealer negotiations, died after MADA withdrew its support. *Ibid.* The same committee also deleted the recoupment bar contained in a second (MADA-drafted) bill — LD 1294 — but restored the recoupment bar after MADA "mounted an intense lobbying campaign." *Ibid.*

In the course of lobbying for LD 1294, the dealers argued that "[m]anufacturer surcharges are forcing consumers to purchase vehicles in New Hampshire and other states where there is no surcharge." E-mail from John Darling, "Call to Action" 2 (April 18, 2003), CAJA 546. Letters and e-mails from Maine motor vehicle dealers to members of the Maine House of Representatives and Senate stated:

- "[S]urcharges must be curtailed as they are forcing Maine consumers to buy out-of-state where Ford dealers don't pay a $500 surcharge." App., *infra*, 10a.
- The Minority Report "eliminates the current price disparity between Maine dealers and surrounding states." Letter from John Darling to Representative Susan M. Austin 2 (April 24, 2003), CAJA 563;
- "People will drive out of their way to save $.02 for a gallon of gas"; so "what would prevent them from driving to New Hampshire to save $500 on a car?" E-mail from Kevin Kelly to John Darling forwarding an e-mail from Kevin

Kelly to Representative Sullivan 1 (April 21, 2003), CAJA 557; and

- Maine motor vehicle dealers did not want "cars to cost $500 more in Maine than they do in New Hampshire." App., *infra*, 10a.[4]

The Maine legislature ultimately enacted LD 1294, and the Governor signed the bill into law on May 30, 2003. See 2003 Me. Laws ch. 356.

C. The District Court's Decisions

On September 4, 2003, the Alliance commenced this action for declaratory and injunctive relief in the United States District Court for the District of Maine under 42 U.S.C. § 1983 asserting, among other things, that the recoupment provision violated the Commerce Clause. App., *infra*, 4a.[5]

The district court denied the Alliance's motion for a preliminary injunction. See *id.* at 44a-66a. The court held that

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[4] Most of these letters are from a single dealer — John Darling. Mr. Darling was one of the two motor vehicle dealers on the State's Retail Rate Reimbursement Commission. See App., *infra*, 9a n.4. He is the former president of MADA — the organization for whom the recoupment bar was drafted. See Affidavit of John Darling, ¶ 1, CAJA 530. And Mr. Darling (or one of his businesses) has been a party in numerous cases concerning Maine's warranty reimbursement statute. Although the court of appeals noted that Mr. Darling was not specifically acting as a member of the Commission in sending these letters (App., *infra*, 9a n.4), his position as a member of the Commission reflected his role as a former president of MADA and a prominent Maine motor vehicle dealer.

[5] The complaint also challenged the recoupment provision under the Takings and Contracts Clauses. The Alliance abandoned the takings claim (App., *infra*, 5a), and the district court and court of appeals rejected the Alliance's Contracts Clause claim. *Id.* at 18a-21a.

the recoupment bar did not discriminate against out-of-state motor vehicle manufacturers because "there are no in-state manufacturers to be favored," (*id.* at 58a), and the degree of "local benefit [from the recoupment bar] and its impact on out-of-state businesses [were] speculative, at best." *Id.* at 59a.

Following the completion of discovery, the parties filed cross motions for summary judgment on the basis of the expanded record. The district court denied the Alliance's motion for summary judgment and granted the State's motion. See *id.* at 23a-43a. Notwithstanding the parties' presentation of new evidence regarding the legislature's purpose that was not available at the preliminary injunction stage, and new legal arguments based on that evidence, the district court found that "[t]he additional memoranda and factual statements [concerning the recoupment bar] have failed to generate any genuine issues of material fact or legal issues not previously disposed of in the preliminary injunction order." *Id.* at 25a. The district court did not address the Alliance's argument that Maine's purpose in enacting the recoupment bar was to discriminate against interstate commerce in violation of the Commerce Clause.

D. The Court of Appeals' Decision

The court of appeals affirmed. *Id.* at 1a-22a. It agreed with the district court's conclusion that the recoupment bar does not have the effect of discriminating against interstate commerce in violation of the Commerce Clause. *Id.* at 14a-17a.

With respect to the Alliance's claim based on discriminatory purpose, the First Circuit noted that "the recoupment bar is fully integrated into Maine's motor vehicle franchise law," (*id.* at 11a), and pointed to Section 1182, the statement of purpose enacted in 1997, although the court acknowledged that Section 1182 was enacted "before the recoupment bar was even a gleam in its sponsors' eyes." *Ibid.*

Despite the six-year gap between enactment of the two provisions, the First Circuit focused on Section 1182 in assessing the purpose of the law enacted in 2003, finding that the recoupment bar was "tailored to achieve the legislative purpose stated in section 1182." *Id.* at 12a. In reaching this conclusion, the First Circuit discounted the contrary evidence concerning the legislature's discriminatory purpose. For example, the First Circuit found that the Retail Rate Reimbursement Commission's statements that Ford's warranty parity surcharge created an "unfair advantage * * * to New Hampshire dealers who [were] not subject to the surcharge" and that "Maine dealers and consumers should not have to pay more than other buyers in other parts of the country" were nothing more than efforts "to highlight a concrete manifestation of the harm attributable to the surcharge," as opposed to "statements of legislative purpose." *Ibid.*

Moreover, the court of appeals declined to apply this Court's instruction that "[l]ess deference to * * * legislative judgment is due * * * where the local regulation bears disproportionately on out-of-state residents and business." *Kassel* v. *Consolidated Freightways Corp.*, 450 U.S. 662, 675-676 (1981) (plurality opinion). Instead, the First Circuit determined that, because the statute did not have a discriminatory effect, it did not bear disproportionately on out-of-state interests. See App., *infra*, 13a. As a result, the court of appeals found *Kassel* was inapposite to its inquiry. *Ibid.* Consequently, it upheld the district court's grant of summary judgment in favor of respondent.

REASONS FOR GRANTING THE PETITION

By relying on a statement of legislative purpose adopted ***six years before*** the statute at issue in this case, the First Circuit's decision runs directly counter to the decisions of this Court and other courts of appeals concerning the methodology a court should employ in determining whether a particular statute was enacted for a discriminatory purpose.

Not only does the decision below conflict with the decisions of this Court and other courts of appeals, the First Circuit's reliance on the earlier general statement of policy has serious implications for a range of constitutional and statutory protections. Challenges brought under the First and Fourteenth Amendments, for example, also turn upon legislative purpose, and given the regularity with which these different lines of case law rely on one another for support regarding the method for determining legislative purpose, a ruling in one area will have ripple effects elsewhere.

This decision creates a loophole that would allow state legislatures to inoculate statutes against legal challenge simply by enacting general statements of benevolent purposes for entire sections of the state's legislative code and then subsequently framing legislation motivated by blatantly impermissible purposes as an amendment to that particular code section. Review by this Court is plainly warranted.

I. THE FIRST CIRCUIT'S DECISION TO ACCORD DETERMINATIVE EFFECT TO A PRIOR-ENACTED STATEMENT OF PURPOSE SQUARELY CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEALS AND WITH THIS COURT'S APPROACH TO IDENTIFYING LEGISLATIVE PURPOSE.

The First Circuit rested its decision regarding the legislative purpose underlying the recoupment bar on the Maine legislature's purpose in enacting Section 1182 — a general statement concerning the Maine motor vehicle franchise law adopted ***six years*** prior to the recoupment bar. The court's reliance on that earlier-enacted declaration of legislative purpose directly conflicts with the decisions of other courts of appeals.

For example, in *Smithfield Foods, Inc.* v. *Miller*, 367 F.3d 1061 (8th Cir. 2004), the Eighth Circuit considered a Commerce Clause challenge to a 2002 amendment to an Iowa

statute (Iowa Code § 9H.2) prohibiting pork and beef processors from engaging in certain activities. The district court, relying on statements of lawmakers and the governor, found that the 2002 amendment to Section 9H.2 prohibiting processors from financing a swine operation in Iowa was passed for a discriminatory purpose in violation of the Commerce Clause. See 367 F.3d at 1065.

The State argued in the court of appeals that the district court erred because it did not rely on the purpose expressed by the legislature when Section 9H.2 was originally enacted in 1975 — that Section 9H.2 was adopted "to preserve free and private enterprise, prevent monopoly, and also to protect consumers." 367 F.3d at 1063 (quoting 1975 Iowa Acts ch. 133, § 2).

The Eighth Circuit, in contrast to the First Circuit in the present case, refused to rely on the 1975 statement of purpose in determining the legislative purpose underlying the 2002 amendment. See *id.* at 1065 n.4. It held that "courts look to direct and indirect evidence to determine whether a state adopted a statute with a discriminatory purpose." *Id.* at 1065. That evidence includes:

> (1) statements by lawmakers, * * *; (2) the sequence of events leading up to the statute's adoption, including irregularities in the procedures used to adopt the law, * * *; (3) the State's consistent pattern of 'disparately impacting members of a particular class of persons,' * * *; (4) the statute's historical background, including 'any history of discrimination by the [state],' * * * and (5) the statute's use of highly ineffective means to promote the legitimate interest asserted by the state.

Ibid. (internal citations omitted);[6] accord *South Dakota Farm Bureau, Inc.* v. *Hazeltine*, 340 F.3d 583, 593-596 (8th Cir. 2003) (observing that plaintiffs can rely on "several sources" to establish a legislature's discriminatory purpose, and determining that the challenged statute was motivated by a discriminatory purpose in violation of the Commerce Clause based on irregularities in the drafting process and statements of the drafters and advocates for the legislation); *SDDS, Inc.* v. *South Dakota*, 47 F.3d 263, 268-271 (8th Cir. 1995) (examining changes in political process and statements in voter guide in determining that a statute discriminated against interstate commerce).

Other courts of appeals have similarly concluded that in order to ascertain legislative purpose, a reviewing court must assess a number of different sources of evidence. In *Waste Management Holdings, Inc.* v. *Gilmore*, 252 F.3d 316, 336 (4th Cir. 2001), the court examined "the specific sequence of events leading up to the particular decision being challenged" and "contemporary statements of decision makers" in finding that the challenged statute was motivated by a discriminatory purpose in violation of the Commerce Clause. See also *McNeilus Truck & Mfg., Inc.* v. *Ohio*, 226 F.3d 429, 443 (6th Cir. 2000) (noting evidence that a statute was passed for a discriminatory purpose in violation of the Commerce Clause based on letters by in-state companies to the Ohio legislature; court did not reach the issue because it held the statute unconstitutional on the basis of discriminatory effect); *Eastern Ky. Res.* v. *Fiscal Court of Magoffin County, Ky.*, 127 F.3d 532, 542 (6th Cir. 1997) (recognizing that discriminatory

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[6] Because the challenged statute was amended during the pendency of the appeal, the Eighth Circuit in *Smithfield Foods* ultimately remanded the case for further factual development with respect to statements of the lawmakers or the governor (similar to those relied on by the district court) to aid the court in determining the purpose underlying the latest amendment. See 367 F.3d at 1066.

purpose may be found based upon other evidence notwithstanding a statutory statement of legislative intent, but concluding that the plaintiff had failed to carry its burden of establishing a discriminatory purpose).

The court below rejected the approach outlined in these decisions. Its analysis instead focused on the statement of purpose enacted six years earlier. See App., *infra*, 11a-12a. To the extent the court even mentioned the 2003 statute, it was only to explain why it refused even to consider the evidence related to the legislative process that led to the 2003 statute (*id.* at 11a-14a) — because it deemed the 1997 provision a more credible statement of legislative intent.

The First Circuit's decision also is starkly inconsistent with this Court's approach to ascertaining legislative purpose. This Court has held that when a court analyzes a statute's purpose, the court is "not bound by 'the name, description or characterization given it by the legislature or the courts of the State' but will determine for itself the practical impact of the law." *Hughes* v. *Oklahoma*, 441 U.S. 322, 336 (1979) (quoting *Lacoste* v. *Louisiana Dept. of Conservation*, 263 U.S. 545, 550 (1924)).

Moreover, "the mere recitation of a benign, compensatory purpose is not an automatic shield which protects against any inquiry into the actual purposes underlying a statutory scheme"; and "[t]his Court need not * * * accept at face value assertions of legislative purpose, when an examination of the legislative scheme and its history demonstrates that the asserted purpose could not have been a goal of the legislation." *Weinberger* v. *Wiesenfeld*, 420 U.S. 636, 648 & n.16 (1975) (rejecting, in an equal protection suit, the proffered purpose of a provision of the Social Security Act that provided different survivors' benefits to surviving husbands than surviving wives).

The court below not only accepted a statutory statement of purpose at face value, it then applied that purpose to a

statute enacted by a different legislature involving different provisions. Contrary to the court of appeals' decision, the recoupment bar has nothing to do with the interest in protecting consumers referred to in Section 1182.

The retail-rate reimbursement statute (Section 1176) provided consumers with complete protection from potentially inflated non-warranty repair costs. The manufacturers' surcharge had no effect whatever on consumers' non-warranty repair costs. Rather, they affected ***dealers'*** costs, and ***dealers'*** profits, as consumers chose to purchase cars in neighboring states to avoid Maine dealers' higher prices. See App., *infra*, 8a (detailing how members of the Retail Rate Commission "note[d] . . . the unfair advantage . . . to New Hampshire dealers who [were] not subject to the surcharge."). The recoupment bar was thus enacted to protect dealers, not consumers.

Indeed, the recoupment bar actually harms consumers by providing dealers with an incentive to raise their retail rates in order to obtain higher warranty reimbursements. Due to the dealers' state-mandated monopoly on warranty repairs, only dealers can perform warranty repairs. For most dealers, warranty repairs constitute a substantial percentage of all service repairs performed at a dealership. By eliminating the possibility of warranty cost recovery on the part of manufacturers, the recoupment bar provides a perverse incentive for dealers to raise their retail rates in order to increase the amount of money they receive in warranty reimbursements.

Moreover, this Court has cautioned that a state's legislative assertions regarding purpose are due "[l]ess deference * * * where the local regulation bears disproportionately on out-of-state residents and business." *Kassel*, 450 U.S. at 675-676. The existence of in-state interests burdened by a regulation serves as a "powerful safeguard against legislative abuse." *Minnesota* v. *Clover Leaf Creamery Co.*, 449 U.S. 456, 473 n.17 (1981).

The court of appeals sought to avoid *Kassel* by finding that the statute does not have a disproportionate impact on out-of-state interests based on its conclusion that the Alliance failed to establish that the recoupment bar has a discriminatory effect on interstate commerce. See App., *infra*, 13a. However, that analysis improperly conflates two separate and distinct concepts.

A finding that the statute does not have a discriminatory effect on interstate commerce does not necessarily mean that the recoupment bar has no disproportionate effect on out-of-state interests. A plain reading of the recoupment bar indicates that it ensures that Maine residents do not bear the costs of the retail-rate reimbursement statute. As the court below observed, "the recoupment bar * * * ensures that manufacturers, not dealers or consumers, will bear the true cost of retail-rate reimbursement." *Id.* at 12a. And, not coincidentally, all of the manufacturers are out-of-state, while the dealers and consumers are in-state. Thus, regardless of whether the recoupment bar discriminates against out-of-state interests, it indisputably places all of the economic costs of compliance with Maine's regulatory scheme on out-of-state manufacturers. *Kassel* is thus directly relevant to this case, and the court of appeals should have taken a more jaundiced view of the Maine legislature's self-serving pronouncements of legislative purpose.

Finally, the court of appeals' approach makes no sense. A legislature could immunize a provision enacted with clear discriminatory intent simply by framing it as an amendment to a pre-existing statute with a benign purpose provision. This Court observed in a related context that it "has refused to rely solely on the legislature's professed purpose and ha[s] looked as well to the effects of the law" because a contrary approach would "enable state legislatures to nullify nearly all unwanted federal legislation by simply publishing a legislative committee report articulating some state interest or policy — other than frustration of the federal objective — that

would be tangentially furthered by the proposed state law." *Gade* v. *Nat'l Solid Waste Mgmt. Assn.*, 505 U.S. 88, 105-106 (1992). The First Circuit's approach is fundamentally flawed for the very same reason.

II. THE PROPER METHOD FOR DETERMINING LEGISLATIVE PURPOSE IS A QUESTION OF GREAT IMPORTANCE RELEVANT TO THE PROPER APPLICATION OF A BROAD RANGE OF FEDERAL CONSTITUTIONAL AND STATUTORY PROTECTIONS.

The legislative purpose inquiry is not restricted to claims under the dormant Commerce Clause; it also arises in cases asserting violations of the First or Fourteenth Amendments. The decision below therefore has implications far beyond Commerce Clause jurisprudence.

"Examination of purpose is a staple of statutory interpretation that makes up the daily fare of every appellate court in the country * * * and governmental purpose is a key element of a good deal of constitutional doctrine." *McCreary County* v. *ACLU*, 125 S. Ct. 2722, 2734 (2005) (citing representative cases, including Commerce Clause cases, requiring a determination of governmental purpose). For example, in declaring the display of the Ten Commandments in a Kentucky courthouse to be unconstitutional, this Court examined the legislature's purpose in displaying the monuments. See *id.*; see also *Lemon* v. *Kurtzman*, 403 U.S. 602, 612-613 (1971) (examining whether a statute has a "secular legislative purpose").

Proof of racially discriminatory purpose is also required to demonstrate a violation of the Equal Protection Clause. See *Village of Arlington Heights* v. *Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977) (challenging allegedly discriminatory local zoning decisions). Similarly, in legislative redistricting cases this Court examines whether the particular district boundaries were "motivated by a racial purpose."

Hunt v. *Cromartie*, 526 U.S. 541, 546 (1999); see also *Reno* v. *Bossier Parish Sch. Bd.*, 520 U.S. 471, 481 (1997) (recognizing that both the Fourteenth and Fifteenth Amendments require a plaintiff "to establish that the State or political subdivision has acted with a discriminatory purpose.").

The connection between the legislative purpose inquiry in these various lines of cases is well-established. In fact, each of these different lines of cases considering legislative purpose regularly cross-reference one another in order to establish both the relevance of legislative purpose and the appropriate method of determining that purpose. See, *e.g.*, *McCreary County*, 125 S. Ct. at 2734 (citing Commerce Clause cases); *Waste Mgmt. Holdings*, 252 F.3d at 336 (citing equal protection case for standard for determining legislative purpose). In each of these cases, "[d]etermining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Village of Arlington Heights*, 429 U.S. at 266.

Legislative purpose also controls preemption under several federal statutes. For example, the Occupational Safety and Health Act (29 U.S.C. §§ 651 *et seq.*) pre-empts all state laws that address occupational safety and health standards. "[A] state law that expressly declares ***a legislative purpose*** of regulating occupational health and safety would * * * be pre-empted by an OSHA standard regulating the same subject matter." *Gade*, 505 U.S. at 105 (emphasis added). This Court has also made clear that a state statute is preempted by the Atomic Energy Act (42 U.S.C. §§ 2011 *et seq.*) if the underlying purpose of the state statute is to address nuclear safety concerns. *English* v. *General Elec. Co.*, 496 U.S. 72, 84 (1990).

The decision below threatens this sensitive inquiry into legislative purpose. The First Circuit's rationale for relying on Section 1182 was that both Section 1182 and the recoup-

ment bar generally relate to the regulation of motor vehicles. On that theory, any provision codified within the motor vehicle franchise law must be interpreted as furthering the purpose set forth in Section 1182 — no matter when it was enacted, no matter what its terms, no matter what its actual effect, and no matter what the Maine legislature's actual purpose in enacting it. That analysis defies logic — and creates a significant loophole in important constitutional and statutory protections — permitting a state to insulate itself from challenges involving a statute's purpose simply by enacting a provision reciting a benign purpose, and applying that provision to an entire title of the state code. The First Circuit's analysis cannot be permitted to stand.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX

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APPENDIX A

United States Court of Appeals,
First Circuit.

ALLIANCE OF AUTOMOBILE MANUFACTURERS,
Plaintiff, Appellant,

v.

DAN A. GWADOSKY, in his official capacity as Secretary of State of the State of Maine, and G. STEVEN ROWE, in his official capacity as Attorney General of the State of Maine,
Defendants, Appellees.

No. 05-1259.

Nov. 18, 2005.

Before SELYA, Circuit Judge, COFFIN, Senior Circuit Judge, and HOWARD, Circuit Judge.

SELYA, Circuit Judge.

This appeal is the latest chapter in an epic struggle between motor vehicle manufacturers and their dealers in the State of Maine. *See Alliance of Auto. Mfrs. v. Gwadosky*, 304 F. Supp. 2d 104, 106-09 (D. Me. 2004) [*Alliance I*] (discussing the historical antecedents). The controversy centers on reimbursement for warranty work. Thirty years ago, the state legislature intervened in this tug-of-war to ensure equity and to prevent collateral damage to consumers. More recently, the legislature amended the state regulatory scheme to prohibit manufacturers from adding state-specific surcharges to wholesale motor vehicle prices in order to recoup the costs of their compliance with retail-rate reimbursement laws (such as the one that the Maine legislature previously had enacted).

The Alliance of Automobile Manufacturers (the Alliance), a national trade association whose members are BMW Group, DaimlerChrysler Corp., Ford Motor Co., General Motors Corp., Mazda North American Operations, Mitsubishi Motors North America, Inc., Porsche Cars North America, Inc., Toyota Motor North America, Inc., and Volkswagen of America, Inc., challenged the recoupment bar as, among other things, a violation of both the Commerce and Contracts Clauses of the United States Constitution. The district court rejected that binary challenge. After careful consideration of the claims asserted, we conclude that the Alliance has not made out a genuine issue of material fact as to the existence of a constitutional violation. Consequently, we affirm the judgment below.

I. BACKGROUND

The historic relationship between motor vehicle manufacturers and dealers is not a particularly congenial one. *See, e.g., Gen. Motors Corp. v. Darling's*, 324 F. Supp. 2d 257 (D. Me. 2004), *amended in part by* 330 F. Supp. 2d 9 (D. Me. 2004); *Liberty Lincoln-Mercury, Inc. v. Ford Motor Co.*, 923 F. Supp. 665 (D.N.J. 1996), *aff'd*, 134 F.3d 557 (3d Cir. 1998); *Darling's v. Ford Motor Co.*, 825 A.2d 344 (Me. 2003). The relationship typically flows from a franchise agreement that, in addition to other provisions, requires the dealer to perform warranty repairs (without regard to whether the dealer sold the vehicle in question) and sets out explicit rules for how the manufacturer will reimburse the dealer for that work.

Predictably, warranty reimbursement rates have been a source of considerable friction. The manufacturers have demanded preferential pricing of warranty repairs as a sort of volume discount. The dealers have argued that the discounted rate structure not only reflects an excessive imbalance in market power, but also forces them to increase the charges for non-warranty repairs (a practice that effectively

requires non-warranty customers to subsidize warranty work).

In 1975, the Maine legislature stepped into this imbroglio and began to regulate the price of warranty repairs within Maine's borders. *See* 1975 Me. Laws 1788 (codified as amended at Me. Rev. Stat. Ann. tit. 10, § 1176) (mandating that motor vehicle manufacturers compensate dealers "adequately and fairly" for warranty repairs). In its most recent incarnation, enacted in 1991, this provision requires that manufacturers reimburse their Maine dealers for parts and labor at the retail rates customarily charged to non-warranty customers. *See* Me. Rev. Stat. Ann. tit. 10, § 1176.

In the usual motor vehicle franchise agreement, the manufacturer reserves the right to set wholesale vehicle prices unilaterally.[1] Exercising this right, Ford Motor Co. responded to Maine's amended version of section 1176 by adding a "warranty parity surcharge" to the wholesale price of motor vehicles sold in Maine. This surcharge was designed to recoup the incremental expenses that resulted from retail-rate reimbursement.

Adjudicating a dealer challenge to the surcharge, we held that nothing in Maine's motor vehicle franchise law prohibited it. *See Acadia Motors, Inc. v. Ford Motor Co.*, 44 F.3d 1050, 1055-57 (1st Cir. 1995); *see also Acadia Motors, Inc. v. Ford Motor Co.*, 799 A.2d 1228, 1231 (Me. 2002) (agreeing with this conclusion). In 2002, Ford set its surcharge at $500 per vehicle and collected more than $3,600,000 in additional revenue from Maine dealers. No other manufacturer has, as yet, followed suit.

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[1] General Motors' standard franchise agreement is representative of the genre. It declares in pertinent part that "[p]rices, destination charges, and other terms of sale applicable to any Motor Vehicle may be changed at any time."

Once again, the Maine legislature intervened. After several failed attempts at crafting a solution, it passed Legislative Document 1294. That document amended section 1176 by providing in pertinent part that a motor vehicle manufacturer "may not otherwise recover its cost for reimbursing a [dealer] for parts and labor pursuant to this section." L.D. 1294 § 10, 121st Leg., 1st Reg. Sess. (Me. 2003). For simplicity's sake, we refer throughout this opinion to this proviso—section 10 of L.D. 1294—as the "recoupment bar."

On September 4, 2003, the Alliance filed suit in Maine's federal district court, challenging the recoupment bar as unconstitutional under the Commerce, Contracts, and Takings Clauses. It sought declaratory and injunctive relief and named as defendants Dan A. Gwadosky, in his official capacity as Maine's Secretary of State, and G. Steven Rowe, in his official capacity as Maine's Attorney General (collectively, the State).

The district court allowed the Maine Auto Dealers Association (MADA) a right to participate in the proceedings as an amicus curiae. It proceeded to deny the Alliance's motion for a preliminary injunction, finding that the Alliance had established neither a likelihood of success on the merits nor irreparable harm. *See Alliance I*, 304 F. Supp. 2d at 117; *see also Ross-Simons of Warwick, Inc. v. Baccarat, Inc.*, 102 F.3d 12, 15 (1st Cir. 1996) (explicating the preliminary injunction standard). As to the Commerce Clause challenge, the court concluded that the recoupment bar did not reflect a discriminatory purpose, did not give rise to a discriminatory effect, and did not have any forbidden extraterritorial reach. *See Alliance I*, 304 F. Supp. 2d at 110-14. The Contracts Clause challenge was impuissant, the court ruled, because the recoupment bar "was within the reasonable expectations of the parties." *Id.* at 116.

After limited discovery, the protagonists cross-moved for summary judgment. The district court granted the State's

motion and denied the Alliance's motion, essentially for the reasons elucidated in *Alliance I*. *See Alliance of Auto. Mfrs. v. Gwadosky*, 353 F. Supp. 2d 97, 99-100 (D. Me. 2005) [*Alliance II*]. Along the way, the Alliance voluntarily dismissed the Takings Clause claim.[2]

II. ANALYSIS

On appeal, the Alliance reasserts its position that the recoupment bar violates both the Commerce and Contracts Clauses. We first sketch the familiar summary judgment standard and then deal sequentially with these assertions.

A. *The Summary Judgment Standard.*

A district court may enter summary judgment upon a showing "that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). We review orders granting summary judgment de novo; like the district court, we must scrutinize the record in the light most favorable to the summary judgment loser and draw all reasonable inferences therefrom to that party's behoof. *Houlton Citizens' Coal. v. Town of Houlton*, 175 F.3d 178, 184 (1st Cir. 1999). This standard is not affected by the presence of cross-motions for summary judgment. *See Blackie v. Maine*, 75 F.3d 716, 721 (1st Cir. 1996).

It is within this procedural framework that we assess the Alliance's claims. Our review is not constrained by the lower court's stated rationale; we may affirm the entry of

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[2] The Alliance had challenged another provision of L.D. 1294 on due process grounds. The district court rejected that claim when it granted summary judgment for the State, *see Alliance II*, 353 F. Supp. 2d at 108-09, and the Alliance does not contest that determination.

summary judgment on any ground supported by the record. *See Houlton Citizens' Coal.*, 175 F.3d at 184.

B. *The Commerce Clause Claims.*

The Constitution grants Congress the power "[t]o regulate Commerce . . . among the several States." U.S. Const. art. I, § 8, cl. 3. That grant embodies a negative aspect as well—the "dormant Commerce Clause"—which "prevents state and local governments from impeding the free flow of goods from one state to another." *Houlton Citizens' Coal.*, 175 F.3d at 184. Put another way, the dormant Commerce Clause "prohibits protectionist state regulation designed to benefit in-state economic interests by burdening out-of-state competitors." *Grant's Dairy-Maine, LLC v. Comm'r of Me. Dep't of Agric., Food & Rural Res.*, 232 F.3d 8, 18 (1st Cir. 2000).

The type of inquiry needed to determine whether a state law transgresses the Commerce Clause varies depending upon the nature of the law at issue. A state statute that purports to regulate commerce occurring wholly beyond the boundaries of the enacting state outstrips the limits of the enacting state's constitutional authority and, therefore, is per se invalid. *Pharm. Research & Mfrs. of Am. v. Concannon*, 249 F.3d 66, 79 (1st Cir. 2001), *aff'd sub nom. Pharm. Research & Mfrs. of Am. v. Walsh*, 538 U.S. 644 (2003). A state statute that has no direct extraterritorial reach but that discriminates against interstate commerce on its face, in purpose, or in effect receives a form of strict scrutiny so rigorous that it is usually fatal. This amounts to a "virtually per se invalid rule," *id.* at 79 (citing *Or. Waste Sys., Inc. v. Dep't of Envtl. Quality*, 511 U.S. 93, 99 (1994)), under which such a statute is invalid unless it advances a legitimate local purpose that cannot be served by reasonable non-discriminatory means, *see id.* at 79, 83. A state statute that "regulates evenhandedly and has only incidental effects on interstate commerce" engenders a lower level of scrutiny. *Id.* at 80. That analysis

entails resort to the balancing test limned in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970): "Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Id.* at 142.

The Alliance urges that Maine's recoupment bar violates the dormant Commerce Clause in three ways: (i) it was enacted on the wings of a discriminatory purpose, (ii) it has a discriminatory effect, and (iii) it has an impermissible extraterritorial reach that causes consequences beyond Maine's borders. None of these claims corresponds with the third tier of the analytic framework set out above. In all events, the Alliance has expressly waived any theory of liability premised on the *Pike* balancing test; instead, it has gambled on its theory that the recoupment bar triggers strict scrutiny (and, thus, is per se invalid). *See Alliance I*, 304 F. Supp. 2d at 114; *see also United States v. Zannino*, 895 F.2d 1, 17 (1st Cir. 1990) (explaining that arguments not seasonably made are deemed abandoned). Accordingly, we leave *Pike* to one side.

In the pages that follow, we deal separately with each of the three arguments actually made by the Alliance. Throughout, we keep in mind "[t]he elementary rule . . . that every reasonable construction must be resorted to . . . in order to save a statute from unconstitutionality." *Hooper v. California*, 155 U.S. 648, 657 (1895).

1. *Discriminatory Purpose.* "The core purpose of the dormant Commerce Clause is to prevent states and their political subdivisions from promulgating protectionist policies." *Houlton Citizens Coal.*, 175 F.3d at 188. "A finding that state legislation constitutes 'economic protectionism' may be made on the basis of either discriminatory purpose or discriminatory effect." *Bacchus Imps., Ltd. v. Dias*, 468 U.S.

263, 270 (1984) (citations omitted).[3] The Alliance notes that there are no warranty parity surcharges in neighboring New Hampshire and argues, in part, that discriminatory purpose mars the recoupment bar because the Maine legislature passed the law to deprive New Hampshire motor vehicle dealers of the competitive advantage derived from paying lower wholesale prices than their Maine counterparts for new cars.

To support its claim of discriminatory purpose, the Alliance points to three bodies of evidence:

- Statements contained in the Report of the Commission to Study the Most Effective Method of Providing Retail Rate Reimbursement for Parts and Labor (the Retail Rate Commission Report), a study commissioned by the Maine legislature and published in December of 2000. Specifically, some Commission members "note[d] . . . the unfair advantage . . . to New Hampshire dealers who [were] not subject to the surcharge." Moreover, "[the majority of the Commission] argue[d] that Maine dealers and consumers should not have to pay more than other buyers in

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[3] While courts routinely recite this test, *see, e.g., Chem. Waste Mgmt., Inc. v. Hunt*, 504 U.S. 334, 344 n. 6 (1992); *Int'l Truck & Engine Corp. v. Bray*, 372 F.3d 717, 725 (5th Cir. 2004); *Chambers Med. Techs. of S.C., Inc. v. Bryant*, 52 F.3d 1252, 1256 (4th Cir. 1995); *Old Coach Dev. Corp. v. Tanzman*, 881 F.2d 1227, 1231 (3d Cir. 1989), there is some reason to question whether a showing of discriminatory purpose alone will invariably suffice to support a finding of constitutional invalidity under the dormant Commerce Clause. *See* Kathleen M. Sullivan & Gerald Gunther, Constitutional Law 275 (15th ed. 2004) (recognizing the analytical difficulty that arises because "a law motivated wholly by protectionist intent might fail to produce significant discriminatory effects").

other parts of the country." These statements were made while recommending, among other things, the enactment of a cost-recovery prohibition should negotiations between manufacturers and dealers fail to yield a compromise solution.

- The legislative process that led to passage of the recoupment bar. Specifically, the Maine legislature enacted L.D. 1294 only after the relevant legislative committee twice passed compromise legislation that did not include a cost-recovery prohibition. The first compromise bill, resulting from manufacturer-dealer negotiations, died after MADA withdrew its support. *See* Comm. Amend. "___" to L.D. 322, 120th Leg., 1st Reg. Sess. (Me. 2001). The same committee also deleted the recoupment-bar language contained in a second (MADA-drafted) bill (L.D. 1294), *see* Majority Rep. for L.D. 1294, 121st Leg., 1st Reg. Sess., at 1 (Me. 2003), but restored it after MADA mounted an intense lobbying campaign. The legislature ultimately enacted that version of the bill into law. *See* 2003 Me. Laws 1067 (codified at Me. Rev. Stat. Ann. tit. 10, § 1176).

- Materials generated in the course of MADA's lobbying campaign, and, more specifically, the statements of one dealer, John Darling (of the several statements that the Alliance cites, only one is attributable to a dealer other than Darling).[4] In communications with members of the legislature, Darling lobbied in favor

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[4] Although Darling was also a member of the Retail Rate Commission, he did not make any of the cited statements in that capacity. Rather, he spoke as a Maine dealer and a member of MADA's board of directors, years after the Commission had concluded its business.

> of the recoupment bar by emphasizing the price disparity between Maine and New Hampshire and the competition among dealers in the two states. His statements include: "[Maine dealers] don't want cars to cost $500 more in Maine than they do in New Hampshire," "[the cost-recovery prohibition] eliminates the current price disparity between Maine dealers and surrounding states," and "surcharges must be curtailed as they are forcing Maine consumers to buy out-of-state where Ford dealers don't pay a $500 surcharge."

At the outset, we brush aside the questions raised below regarding the Alliance's standing to challenge the law on Commerce Clause grounds. A trade association's standing may derive from its members' standing. *See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 181 (2000) (limning requirements for derivative standing). Ford, a member of the Alliance, has suffered concrete pecuniary injury from the recoupment bar. That injury is enough to ground the Alliance's standing to sue even though the Alliance is not a member of the out-of-state class against whom the recoupment bar ostensibly discriminates. *See Bacchus Imps.*, 468 U.S. at 267 (holding that in-state liquor wholesalers had standing to challenge a Hawaii law that allegedly burdened out-of-state liquor producers because the wholesalers suffered economic injury); *see also Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 286 (1997).

Having confirmed the Alliance's standing, we turn to the merits of the claim. The Alliance, as the party challenging the validity of the recoupment bar, bears the burden of demonstrating that the statute was animated by a discriminatory purpose. *See Hughes v. Oklahoma*, 441 U.S. 322, 336 (1979). Notwithstanding the generosity inherent in our standard of review—we must assay the facts in the light most flattering to the party against whom summary judgment has

been granted, *Houlton Citizens' Coal.*, 175 F.3d at 184—the Alliance has failed to carry this burden.

The most debilitating weakness in this argument results from the fact that the Alliance loses sight of the forest while searching for trees. The purpose of a statute, like its meaning, must be discerned from the statute as a whole. Thus, context is a critically important interpretive tool. *See Edwards v. Aguillard*, 482 U.S. 578, 594 (1987) ("The plain meaning of the statute's words, enlightened by their context and the contemporaneous legislative history, can control the determination of legislative purpose."). The Alliance's strained attempt to piece together isolated bits of evidence ignores the larger context in which the recoupment bar rests. An assessment of that larger context makes manifest the evident purpose of the recoupment bar.

The recoupment bar is fully integrated into Maine's motor vehicle franchise law. *See* Me. Rev. Ann. Stat. tit. 10, §§ 1171 to 1190-A. It comprises one sentence of one section of that intricately constructed law—a section that has been on the books, in one form or another, for three decades. *See id.* § 1176. The rationale for the motor vehicle franchise law can be found within the four corners of the statute itself: its purpose is "to prevent frauds, impositions and other abuses against residents and to protect and preserve the economy, the investments of residents, the public safety and the transportation system of the State." *Id.* § 1182. Although the legislature adopted this policy in 1997 (before the recoupment bar was even a gleam in its sponsors' eyes), its spirit permeates the statutory scheme and reflects the core purpose of section 1176 (which, of course, had been on the books for over twenty years when the policy statement was adopted).

Seen in this light, it is readily apparent that the overriding legislative objective behind section 1176 was to prevent an unfair price differential between warranty and non-warranty repair work—a differential that the Maine legislature rea-

sonably viewed as detrimental to consumers and motor vehicle dealers alike. Ford's counter—the imposition of the warranty parity surcharge—thwarted this purpose and revealed the existence of a loophole in the retail-rate reimbursement provision. The recoupment bar was a device designed to plug that loophole and restore the structural integrity of section 1176's warranty-reimbursement scheme.

Read in its entirety, the Retail Rate Commission Report confirms this understanding. In the opening sections of that document, the Commission reiterated the root purposes of section 1176: "to protect retail customers" and "to protect Maine automobile dealers from the superior bargaining position of the national manufacturers." The Commission deemed "[t]he current surcharge practices of the manufacturers" as "contrary to the intent of the statute" and premised its consideration of the cost-recovery question on that assumption. Against this background, the Commission's occasional references to the surcharge's competitive impact on Maine motor vehicle dealers are best understood as efforts to highlight a concrete manifestation of the harm attributable to the surcharge, not as statements of legislative purpose.

The presence of other, less direct evidence reinforces this view. In this regard, the most salient fact is that the recoupment bar is closely tailored to achieve the legislative purpose stated in section 1182. *Cf. Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 352 (1977) (finding it "somewhat suspect" that the means chosen to effectuate the challenged regulation's "ostensible . . . purpose" were relatively ineffective). The recoupment bar plugs the loophole that Ford was exploiting with perfect precision and ensures that manufacturers, not dealers or consumers, will bear the true cost of retail-rate reimbursement.

The Alliance urges us to look past this larger context based on the tenet that "[l]ess deference to . . . legislative judgment is due . . . where the local regulation bears dispro-

portionately on out-of-state residents and businesses." *Kassel v. Consol. Freightways Corp.*, 450 U.S. 662, 675-76 (1981) (plurality opinion). That tenet is inapposite here. The *Kassel* plurality's exhortation to look beyond legislative judgments is predicated on the existence of a threshold condition: the statute must bear disproportionately on out-of-state interests. As we soon discuss, *see infra* Part II(B)(2)-(3), the recoupment bar does not possess so invidious an impact.

At any rate, the legislative process evidence upon which the Alliance relies is indeterminate. As a general rule, statutory interpretation cannot safely be made to rest upon inferences drawn from intermediate legislative maneuvers. *See Trailmobile Co. v. Whirls*, 331 U.S. 40, 61 (1947). In this instance, such reliance would be especially problematic because there are countless reasons why the state legislature may have altered its position.

Where, as here, a party presents circumstantial evidence of an allegedly discriminatory purpose in support of a dormant Commerce Clause argument, it is that party's responsibility to show the relationship between the proffered evidence and the challenged statute. *See E. Ky. Res. v. Fiscal Court*, 127 F.3d 532, 543 (6th Cir. 1997). While statements by a law's private-sector proponents sometimes can shed light on its purpose, *see, e.g., S.D. Farm Bureau v. Hazeltine*, 340 F.3d 583, 594-95 (8th Cir. 2003), the correspondence of a single lobbyist has little (if any) probative value in demonstrating the objectives of the legislative body as a whole. *See, e.g., Bell Atl. Tel. Cos. v. FCC*, 131 F.3d 1044, 1048 (D.C.Cir. 1997). This is particularly so when, as in this case, far stronger statements of intent can be gleaned from official legislative sources. *See Garcia v. United States*, 469 U.S. 70, 76 (1984) (eschewing reliance on the comments of a single legislator and emphasizing that "the authoritative source for

finding the Legislature's intent lies in the Committee Reports on the bill").

None of this is to say that the legislature was blind to the plight of Maine's motor vehicle dealers. The record makes pellucid, however, that if a potential discriminatory purpose was lurking in the background, that purpose was, at most, incidental to the primary purposes that we have identified. Incidental purpose, like incidental effect, cannot suffice to trigger strict scrutiny under the dormant Commerce Clause. *Cf. Pike*, 397 U.S. at 142 (adhering to a lower level of scrutiny when "effects on interstate commerce are only incidental").

2. ***Discriminatory Effect.*** We turn next to the Alliance's attempt to demonstrate that the recoupment bar has a discriminatory effect. The Alliance posits that the recoupment bar manifests this pernicious effect in two ways: first, it eliminates the competitive advantage of New Hampshire dealers viś-à-vis Maine dealers; and second, it exports the cost of retail-rate reimbursement nationally to out-of-state dealers. The problem here is practical, not conceptual. After combing the record, we conclude that the Alliance has not put forth sufficient evidence to survive summary judgment with respect to either such effect.

To support its assertion that the recoupment bar has an advantage-stripping effect on New Hampshire dealers, the Alliance relies on one central piece of evidence—a stipulation that "[t]here is some competition between motor vehicle dealers in Maine and motor vehicle dealers in other states." That stipulation, however, bears only a tangential relationship to the Alliance's theories of discriminatory effect. While the Alliance visualizes the recoupment bar as "an effort to stem the tide of customers deciding to purchase motor vehicles in New Hampshire rather than Maine," Appellant's

Br. at 25,[5] the stipulation supplies no proof of a cross-border "tide." There is likewise no evidence of how Ford's implementation of a warranty parity surcharge may (or may not) have affected interstate competition, nor is there any evidence of the recoupment bar's supposed interference with the competitive process. For all that the record discloses, we could just as easily surmise that any success that New Hampshire dealers may have had in luring Maine customers was premised on, say, better service, a willingness to accept lower profit margins, more convenient locations, or New Hampshire's eschewal of a general statewide sales tax.

To be sure, the Alliance endeavors to bolster the stipulation by reiterating the same amalgam of Retail Rate Commission and lobbyist statements on which it relied in its assertion of discriminatory purpose. For good measure, it adds the observation of a Ford official that state-specific pricing actions "may put [dealers] at a cost disadvantage . . . vis-[à]-vis dealers in bordering states." These augmentations add nothing of substance to the Alliance's claim. At best, they reflect generalizations, unsupported by either statistical analysis or concrete facts, about the competitive position of Maine dealers.[6]

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[5] All citations to the appellant's brief refer to the version filed under seal.

[6] In their briefs and at oral argument, the parties devoted much time and energy to New Hampshire's retail-rate reimbursement law. N.H.Rev.Stat. Ann. § 357-C:5(II)(b). Although that statute is similar to Maine's retail-rate reimbursement law, manufacturers have continued to pay for warranty work at discounted rates. Against this background, the State argued that New Hampshire's requirement is mandatory and that the Alliance, by flouting that requirement, improperly fabricated the competitive advantage that it claims Maine law destroys. The Alliance demurs; it interprets New Hampshire's statute as optional, and insists that New Hampshire dealers are simply not submitting claims for retail rates. We

As to its contention that the recoupment bar "effectively require[s] that all dealers nationwide fund the additional manufacturer payments associated with warranty repairs in Maine," Appellant's Br. at 35, the Alliance once again relies on a single piece of evidence: this time, the insistence of a General Motors' plenipotentiary that her company cannot absorb costs, but, as a commercial entity, must account for them somehow (such as through national price adjustments).[7] But this statement is a waif in the wilderness. The Alliance adduced no evidence of national vehicle pricing, and nothing in the record illuminates wholesale vehicle prices in Maine, New Hampshire, or elsewhere. By like token, there is not a shred of evidence that speaks reliably to trends in pricing after Maine's enactment of either its retail-rate reimbursement law or the recoupment bar. Finally, the record fails to provide a definitive statement of retail-rate reimbursement costs incurred by manufacturers in Maine for which they allegedly must account.

The proponent of a dormant Commerce Clause claim bears the burden of proof as to discrimination. *See Hughes*, 441 U.S. at 336. To block summary judgment, the party having the burden of proof on a critical issue must present evidence on that issue that is "significantly probative," not

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need not resolve these conflicting accounts because the Alliance has not presented enough evidence of discriminatory effect to warrant further inquiry into the requirements of New Hampshire law.

[7] It seems odd to rely on General Motors for concrete evidence of the recoupment bar's effects, given that General Motors has never imposed a warranty parity surcharge in Maine. To compound the oddity, the record contains a statement from a representative of Ford that cost absorption is in fact an option and, moreover, an option to which Ford has resorted in the past. Because of the overall paucity of proof, however, we need not explore these curiosities.

"merely colorable." *Cadle Co. v. Hayes*, 116 F.3d 957, 960 (1st Cir. 1997) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-50 (1986)). The Alliance has not satisfied that requirement here; it has offered only prognostications woven from the gossamer strands of speculation and surmise, unaccompanied by any significantly probative evidence of either advantage-stripping or cost-exportation. That is inadequate to make out a genuine issue of material fact.[8] *See Medina-Munoz v. R.J. Reynolds Tobacco Co.*, 896 F.2d 5, 8 (1st Cir. 1990) (explaining that "conclusory allegations, improbable inferences, and unsupported speculation" are entitled to no weight in the summary judgment calculus).

3. *Extraterritorial Reach.* The Alliance's final Commerce Clause claim is that the recoupment bar has an extraterritorial reach that produces a constitutional infirmity. This claim rests on the premise that the recoupment bar has the impermissible "practical effect of tying the wholesale price of motor vehicles in Maine to the wholesale price of identical motor vehicles outside of Maine" by making "the wholesale price of motor vehicles in Maine the minimum wholesale price in the 49 other states." Appellant's Br. at 39-40. Despite this bold declaration, the Alliance adduced no probative evidence of price-tying below. On appeal, it rehashes yet again the same evidence that it offered in connection with discriminatory purpose and adds one weapon to its armamentarium—the suggestion of a Commission member that Maine "should move into law that manufacturers may not charge a different price to Maine dealers."

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[8] Because the Alliance has failed in its proof, we need not decide whether its legal theories of discriminatory effect, if adequately supported by probative evidence, would suffice to trigger strict scrutiny.

These statements (all of which were made well before the legislature acted) tell us nothing about either the recoupment bar's reach or its *actual* effect on national pricing. Furthermore, the record reflects, and the Alliance itself acknowledges, that manufacturers add state-specific surcharges to motor vehicle wholesale prices for a wide variety of reasons (e.g., some manufacturers impose a California-specific surcharge to recover costs associated with that state's environmental regulations). This potential still exists for motor vehicles sold in Maine; nothing in Maine law prevents automobile manufacturers from adjusting their wholesale prices based on transportation costs, labor costs, or the like. There is only one limitation: manufacturers cannot use surcharges to recover warranty-reimbursement costs (and, thus, to frustrate the purpose of Maine's retail-rate reimbursement statute). Like the elephant in the parlor, the implications of this conclusion are too obvious to ignore. The recoupment bar does not transform Maine prices into national minimum prices because automobile manufacturers retain the ability to adjust those prices for any reason save one.

On this sparse record, our extraterritorial-reach inquiry is short and to the point. The inference that the Alliance would have us draw is simply too much of a stretch. In view of this shortcoming and because the Alliance has not provided any other, more reliable proof of the price-tying allegedly associated with the recoupment bar, the lower court did not err in entering summary judgment on the extraterritorial reach claim. *See* Fed. R. Civ. P. 56(c). Consequently, there is no cause to engage the Alliance's legal theory.

C. *The Contracts Clause Claim.*

The Alliance also attacks the recoupment bar on a second front. It argues that Maine, in derogation of the Contracts Clause, has trespassed on manufacturers' franchise agreements by eliminating components of the manufacturers' pricing discretion.

The Contracts Clause declares that: "No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . . ." U.S. Const. art. I, § 10, cl. 1. Though seemingly absolute in its prohibition, the Contracts Clause "must be accommodated to the inherent police power of the State 'to safeguard the vital interest of its people.'" *Energy Reserves Group, Inc. v. Kan. Power & Light Co.*, 459 U.S. 400, 410 (1983) (quoting *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 434 (1934)).

To determine whether the Contracts Clause is implicated, a reviewing court first must ask "whether the state law has, in fact, operated as a substantial impairment of a contractual relationship." *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 244 (1978). This inquiry elicits an affirmative answer only if "a contractual relationship exists, that relationship is impaired by a change in the law, and the resultant impairment is substantial." *Houlton Citizens' Coal.*, 175 F.3d at 190. The first two of these three factors are often easily satisfied, and this case falls into that pattern: automobile manufacturers typically have franchise agreements with dealers that reserve the right to set wholesale motor vehicle prices unilaterally, *see supra* note 1, and the recoupment bar now restricts their ability to exercise that right. The question of substantial impairment is, therefore, dispositive.

The parties' reasonable expectations are central to the issue of substantiality. In that regard, it is especially important whether or not the parties have been operating in a regulated industry. *Energy Reserves*, 459 U.S. at 413; *Houlton Citizens' Coal.*, 175 F.3d at 190. Maine has heavily regulated the manufacturer-dealer franchise relationship, including warranty reimbursement rates, since 1975. *See* 1975 Me. Laws 1732-39 (codified as amended at Me. Rev. Stat. Ann. tit. 10, §§ 1171 to 1190-A); *see also Alliance I*, 304 F. Supp. 2d at 115. The recoupment bar—a necessary means to effectuate the State's warranty reimbursement policy—was a foresee-

able addition to that regulatory regime. It was, therefore, permissible under the Contracts Clause. After all, if the Contracts Clause allows a State to dictate the price of warranty repairs in the first instance, it perforce allows the State to require that the manufacturer, rather than the dealer or the consumer, absorb the true cost of those repairs. *Cf. Exxon Corp. v. Eagerton*, 462 U.S. 176, 194 (1983) (holding that a State that regulates the price of a commodity may require the sellers to "absorb a tax increase themselves rather than pass it through to their consumers").

It follows inexorably, as night follows day, that the recoupment bar did not substantially impair franchise agreements entered after 1975. Those franchise agreements were executed with the knowledge and expectation of pervasive state regulation.

As to franchise agreements entered before 1975—the record reveals no fewer than six that fit into that taxonomy—our inquiry continues. As to those agreements, we ask "whether the impairment, albeit substantial, is reasonable and necessary to fulfill an important public purpose." *McGrath v. R.I. Ret. Bd.*, 88 F.3d 12, 16 (1st Cir. 1996). The public purpose requirement ensures that the State is exercising its police power and not catering to special interests. *See Energy Reserves*, 459 U.S. at 412.

As we have said, Maine's legislature passed the recoupment bar as a consumer—and dealer-protection measure to plug a loophole in, and better effectuate the goals of, the state's retail-rate reimbursement law. *See supra* Part II(B)(1). That rationale brings the recoupment bar squarely within the category of remedies to generalized social or economic problems that constitute legitimate subjects for legislation, notwithstanding the imperatives of the Contracts Clause. *See Energy Reserves*, 459 U.S. at 411-12; *see also Greenwood Trust Co. v. Massachusetts*, 971 F.2d 818, 828 (1st Cir. 1992) (describing "consumer protection" as a "sub-

ject [ ] over which the states have traditionally exercised their police powers").

The Alliance tries to parry this thrust by characterizing the recoupment bar as a direct adjustment of manufacturers' and dealers' contractual rights. That characterization elevates hope over reason. In each of the cases on which the Alliance relies, the reviewing court found no credible evidence of a legitimate public purpose. *See Equip. Mfrs. Inst. v. Janklow*, 300 F.3d 842, 860-61 (8th Cir. 2002) (noting that "both the State and the [defendant] concede that the Act's purpose is to level the playing field between manufacturers and dealers" and that there was no evidence of any significant public purpose); *McDonald's Corp. v. Nelson*, 822 F. Supp. 597, 608-09 (S.D. Iowa 1993) (pointing out that "the articulated overall purpose of the Act is specifically to adjust the balance of power between the contracting parties" and that the Act implicated no broad societal interest). As we already have explained, Maine's recoupment bar aspires to protect consumers as well as dealers. Its purpose is much broader than a simple reallocation of existing contractual rights and, thus, that purpose qualifies as significant, legitimate, and public. *See Energy Reserves*, 459 U.S. at 411-12 & n. 13.

When, as in this instance, the State is not a party to a contract, courts ordinarily defer, within broad limits, to the legislature's judgment about the reasonableness and necessity of a particular measure. *See id.* at 412-13. Given the recoupment bar's evident purpose and the legislature's careful tailoring of it to fit that purpose, we are constrained to follow that praxis here. We hold, therefore, that the recoupment bar passes muster under the Contracts Clause as to both pre-1975 and post-1975 franchise agreements.

III. CONCLUSION

Refined to bare essence, this appeal involves a policy decision by the Maine legislature to prevent motor vehicle manufacturers from imposing compulsory discounts on dealers who perform warranty repairs. In the case of a particular manufacturer, that policy decision was negated by a warranty parity surcharge added to the wholesale price of all vehicles sold to Maine dealers. The legislature countered by enacting the recoupment bar as a means of plugging the loophole and restoring the structural integrity of its original policy. The Alliance strives to characterize this wholly Maine sequence of events as a deprivation of an out-of-state competitive advantage, a cost-exporting scheme, or a price-tying mechanism. To advance such a characterization is tantamount to saying that when a State resolves to prevent or correct a practice pursued by a manufacturer, which it reasonably has determined is contrary to its declared public policy, it must force its own citizens rather than the errant manufacturer to bear the cost. The Constitution does not require so Kafkaesque a scenario. Thus, we hold that the Alliance's Commerce Clause claims are without merit.

The Alliance's attempt to dress this case in the raiment of a Contracts Clause violation fares no better. Maine heavily regulates franchise agreements between motor vehicle manufacturers and dealers, and the recoupment bar does not impermissibly impinge upon those agreements.

We need go no further. The upshot is that the district court's grant of summary judgment in favor of the State was entirely correct.

Affirmed.

APPENDIX B

United States District Court,
D. Maine.

ALLIANCE OF AUTOMOBILE MANUFACTURERS,
Plaintiff,

v.

DAN A. GWADOSKY, ET AL,
Defendants.

No. CIV.03-154-B-W.

Jan. 25, 2005.

ORDER ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

WOODCOCK, District Judge.

In 2003, the State of Maine enacted legislation creating the Maine Motor Vehicle Franchise Board (the "Board") to oversee compliance with state laws regulating the relationship between automobile manufacturers and their dealers. The Board consists of seven members: three motor vehicle dealers, one manufacturer, two members of the public, and a state employee chair. The Plaintiff is the Alliance of Automobile Manufacturers ("Alliance"), and as the name implies, it is a trade association of automobile manufacturers.[1] To say Alliance does not like the new law is an understatement.[2] It

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[1] The Defendants are Dan A. Gwadosky, in his official capacity as Secretary of State of the State of Maine, and G. Steven Rowe, in his official capacity as Attorney General of the State of Maine (collectively, "the State").

[2] The litigious and occasionally rancorous relationship between the manufacturers and their dealers in Maine and elsewhere is a matter of public record. *See New Motor Vehicle Bd. of California v.*

has come to court to try and stop it. This Court earlier denied Alliance's request for a preliminary injunction against operation of the law, and the parties have now filed dispositive motions. In its order on the preliminary injunction, this Court ruled on nearly all of the parties' contentions, and it concludes, as to those issues, no further explanation is necessary. However, Alliance has raised a new issue: whether the composition of the Board, with its three to one weighting in favor of the dealers, constitutes a violation of due process. This Court rules the composition of the Board does not violate due process and GRANTS Defendants' Motion for Summary Judgment and DENIES Plaintiff's Motion for Summary Judgment.

I. FACTUAL BACKGROUND

The history of this case is recited in this Court's preliminary injunction order, *Alliance of Automobile Manufacturers v. Gwadosky*, 304 F. Supp. 2d 104 (D. Me. 2004). This Court adopts the facts in that order and discusses additional relevant facts below.

II. LEGAL STANDARD

Because this Court has considered the State's Statement of Material Facts, the State's Motion to Dismiss must be treated as a Motion for Summary Judgment. *See* Fed. R. Civ. P. 12(b) ("If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment . . . ."). Alliance has also moved for summary judgment in its favor. Summary judgment is proper where "the pleadings, deposi-

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Orrin W. Fox Co., 439 U.S. 96 (1978); *Alliance of Auto. Mfrs. v. Gwadosky*, 304 F. Supp. 2d 104 (D. Me. 2004).

tions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *see also Velez-Gomez v. SMA Life Assurance Co.*, 8 F.3d 873, 875 (1st Cir. 1993).

III. DISCUSSION

A. Section 10 of L.D. 1294

Alliance contends Section 10 violates the Commerce and Contract Clauses of the United States Constitution. Alliance raises the same arguments here as it did in its Motion for Preliminary Injunction, which this Court rejected. The additional memoranda and factual statements have failed to generate any genuine issues of material fact or legal issues not previously disposed of in the preliminary injunction order.[3] There is no reason to alter this Court's earlier conclu-

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[3] The record before this Court on the parties' motions for summary judgment regarding whether Section 10 violates the Contract Clause differs from the record presented on Alliance's Motion for Preliminary Injunction in one respect only: six current Ford dealer contracts predating 1975, which is the date Maine's comprehensive regulatory law governing automobile franchise relationships was enacted. "If the state regulation constitutes a substantial impairment, the State, in justification, must have a significant and legitimate public purpose behind the regulation . . . such as the remedying of a broad and general social or economic problem." *Energy Reserves Group, Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 411-12 (1983). In *Acadia Motors, Inc. v. Ford Motor Co.*, 844 F. Supp. 819 (D. Me. 1994), *aff'd in part, rev'd in part on other grounds*, 44 F.3d 1050 (1st Cir. 1995), Judge Brody addressed whether pre-1975 contracts were impaired by the 1975 regulatory law governing automobile franchise relationships:

> To the extent that § 1176 impairs Ford's interest in its pre-1975 contracts, that section "rests on, and is prompted by, sig-

> nificant and legitimate state interests." *Energy Reserves*, 459 U.S. at 416. The disparity in bargaining power between automobile manufacturers and their dealers prompted the Maine Legislature to enact legislation to protect dealers from actions by manufacturers that were perceived as abusive and oppressive. *See* Me. L.D. 1878, 109th Leg., 2d Sess. (Statement of Fact). The Legislature specifically wanted to prevent manufacturers, "unwilling to pay the fair and full price for repairs made necessary when their automobiles failed to meet warranty standards," to force dealers to shift costs of performing warranty work to nonwarranty customers. *Id.* The Court finds that the Legislature's concern for protection of dealers and the public is a significant and legitimate public purpose to support § 1176. The means chosen by the Legislature to implement these purposes is also reasonable, "particularly in light of the deference to which the [State] Legislature's judgment is entitled." *Energy Reserves*, 459 U.S. at 418.

Acadia Motors, Inc., 844 F. Supp. at 827-28; *see also Exxon Corp. v. Eagerton*, 462 U.S. 176 (1983) (the effect of the pass-through prohibition law on existing contracts that did contain such a provision was incidental to its main effect of shielding consumers from the burden of the tax increase); *New York Cent. R.R. Co. v. White*, 243 U.S. 188 (1917) (a workmen's compensation law may be applied to employers and employees operating under pre-existing contracts of employment that made no provision for work-related injuries); *Stone v. Mississippi*, 101 U.S. 814 (a law barring lotteries may be applied to lottery tickets that were valid when issued); *Boston Beer Co. v. Massachusetts*, 97 U.S. 25 (1877) (a state prohibition law may be applied to contracts for the sale of beer that were valid when entered into).

Furthermore, the pre-1975 contracts expressly "recognize that the rights of the Dealer and the Company under this agreement are defined and limited by the terms of this agreement *and applicable law*." *Ford Sales and Service Agreement Preamble*, page iii (emphasis added). Because the pre-1975 contracts incorporate applicable law, this Court concludes Alliance's reasonable expectations

sions regarding the constitutionality of Section 10. *See Yes for Life Political Action Comm. v. Webster*, 84 F. Supp 2d. 150, 151 (D. Me. 2000) (based on the summary judgment record, no reason to alter conclusions reached in the preliminary injunction order). Accordingly, the State is entitled to summary judgment on Alliance's claim that Section 10 violates the Commerce and Contract Clauses of the United States Constitution.

B. Section 12 of L.D. 1294

Alliance next contends the composition of the Board, established by Section 12 of L.D. 1294, violates the Due Process Clause of the United States Constitution.

1. The Composition of the Board

Section 12, codified at 10 M.R.S.A. § 1187, provides:

> The [Board] . . . is established for the purpose of enforcing the provisions of this chapter.
>
> **1. Membership.** The board consists of 7 members:
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> **A.** Six members appointed by the Governor:
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> **(1)** Three members who are or have been franchised new motor vehicle dealers in the State of Maine;
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> **(2)** A member who is or has been an employee or representative of a franchisor; and
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> **(3)** Two members of the public; and
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> **B.** One member appointed by the Secretary of State who is not and has not been either a motor vehicle dealer or manufacturer representative and who is an

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have not been substantially impaired by the enactment of Section 10. *See Alliance of Auto. Mfrs.*, 304 F. Supp. 2d at 115-16.

attorney employed by the Secretary of State and assigned to the Bureau of Motor Vehicles.[4]

2. The Duties of the Board and its Statutory Procedures

The Board is charged with reviewing complaints alleging violations of the Motor Vehicle Franchise Law and levying civil penalties for violations of the law. 10 M.R.S.A. § 1188(1), (3). It has the power to "conduct and use the same discovery procedures as provided in the Maine Rules of Civil Procedure," *id.* § 1189-A, such as to conduct a pre-hearing conference and to allow discovery, *id.* The Board has the power to hold hearings, *id.* § 1189, and to issue orders, *id.* § 1188(2). Its decisions must be in writing, *id.* § 1188(2), and are subject to appeal to the Superior Court, *id.* § 1189-B. If the appeal is on an issue of law, the superior court may not hear additional evidence and may not set aside the Board's decision, except for error of law. *Id.* § 1189-B(1). If the appeal is on an issue of fact, the superior court must presume all findings of fact of the Board are correct, unless rebutted by clear and convincing evidence. *Id.* § 1189-B(2). The appellant is entitled to trial by jury, but a copy of the Board's decision is admissible into evidence. *Id.*

The Board is given authority over "conduct governed by this chapter." *Id.* § 1188(1). If the Board determines that a violation of the Motor Vehicle Franchise Law has occurred, it is empowered to impose a civil penalty of "not less than $1,000 nor more than $10,000 for each violation." *Id.* § 1171- B(3). The chapter addresses such issues as limita-

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[4] The member appointed by the Secretary of State acts as Chair. Section 12, L.D. 1294, codified at 10 M.R.S.A. § 1187(2). The Chair acts as the presiding officer, makes preliminary rulings, participates fully in board deliberations, and votes on the merits of complaints only to break a tie. 10 M.R.S.A. § 1187(2)(A)-(D).

tions on establishing or relocating dealerships, *id.* § 1174-A, the rights of family members to succeed to franchise ownership, *id.* § 1174-C, product liability claims, *id.* § 1175, reimbursement for warranty claims, *id.* § 1176, written or oral agreements between manufacturers and franchisees, *id.* § 1178, and termination of the franchise, *id.* § 1179. In evaluating the amount of a civil penalty, the Board must consider a series of factors, including the seriousness of the violation and the economic damage to the public. *Id.* § 1171-B(3). The law does not eliminate a party's right to file a civil action in a court of competent jurisdiction, but if the action "gives rise or could give rise to a claim or defense under this chapter," the action must be stayed, if within 60 days after the filing of the complaint or service of process, whichever date is later, a party files a complaint with the Board, asserting the claims or defenses under the chapter. *Id.* § 1190-A.

3. Ripeness

This Court first addresses the State's assertion that Alliance's due process challenge to Section 12 is not ripe for judicial consideration because there is no actual proceeding before the Board and Alliance has not sought recusal under the Maine Administrative Procedure Act ("APA"), 5 M.R.S.A. § 9063.[5] Alliance, however, has mounted a facial challenge to Section 12, arguing by its terms, the law violates due process by depriving manufacturers of a "fair trial in a fair tribunal." *See Withrow v. Larkin*, 421 U.S. 35, 46 (1975)

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[5] 5 M.R.S.A. § 9063(1) provides:

> Hearings shall be conducted in an impartial manner. Upon the filing in good faith by a party of a timely charge of bias or of personal or financial interest, direct or indirect, of a presiding officer or agency member in the proceeding requesting that that person disqualify himself, that person shall determine the matter as a part of the record.

(quoting *In re Murchison*, 349 U.S. 133, 136 (1955)); *see also Gibson v. Berryhill*, 411 U.S. 564, 579 (1973) (holding that those with substantial pecuniary interest in legal proceedings should not adjudicate those disputes).

Facial challenges to statutes or regulations are commonly ripe as of enactment. *Yee v. City of Escondido, Cal.*, 503 U.S. 519, 534 (1992) (because petitioners' allegation "does not depend on the extent to which petitioners are deprived of the economic use of their particular pieces of property or the extent to which these particular petitioners are compensated, petitioners' facial challenge is ripe."). Purely legal or constitutional issues are generally fit for judicial adjudication, as they implicate no special agency expertise. *See, e.g., Pennell v. City of San Jose*, 485 U.S. 1, 11-15 (1988) (while "as applied" due process and equal protection challenge to rent control ordinance was not ripe because it required factual context that could only be developed during agency proceedings, facial attack presented purely legal issues and was ripe for adjudication). Moreover, the Supreme Court has reached the merits of a facial due process claim, as raised here, without questioning ripeness. *See, e.g., Friedman v. Rogers*, 440 U.S. 1, 18 (1979), *reh'g denied*, 441 U.S. 917 (1979) (upholding the composition of the Texas Optometry Board against facial constitutional challenge). Thus, Alliance's facial challenge to Section 12 is ripe for judicial consideration.[6]

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[6] The State's argument that Alliance's due process claim is not ripe because it failed to seek recusal of biased Board members under 5 M.R.S.A. § 9063 before bringing this claim is meritless since Alliance is not waging an "as applied" constitutional challenge, but rather a facial constitutional challenge. Because there has been no actual proceeding before the Board, Alliance has not yet had the opportunity to avail itself of the recusal methods in § 9063.

4. Due Process

Alliance asserts that manufacturers will be unable to receive a fair and impartial hearing because three seats on the seven-member Board are reserved for dealers and that there are no procedural safeguards to insure that members with pecuniary interests recuse themselves.

a. General Principles

A statute is presumed constitutional, and the "burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it," whether or not the basis has a foundation in the record. *Heller v. Doe*, 509 U.S. 312, 320-21 (1993) (citation omitted). This Court is obligated to apply "the elementary rule" that "every reasonable construction must be resorted to in order to save a statute from unconstitutionality." *Hooper v. California*, 155 U.S. 648, 657 (1895). When faced with two possible constructions of a statute, one of which would raise "serious constitutional problems" while the other would not, courts are required to construe the statute to avoid such problems. *INS v. St. Cyr*, 533 U.S. 289, 299-300 (2001).

Moreover, Alliance's "facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 745 (1987); *see also Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 495 (1987) ("Petitioners thus face an uphill battle in making a facial attack on the Act as a taking."); *Pharm. Research & Mfrs. of Am. v. Concannon*, 249 F.3d 66, 77 (1st Cir. 2001), *aff'd*, 538 U.S. 644 (2003) ("Because this is a facial challenge to a statute, PhRMA has a difficult burden of showing that Medicaid recipients will be harmed by the Maine Rx Program.").

The Supreme Court has long held that a "fair trial in a fair tribunal is a basic requirement of due process." *In re Murchison*, 349 U.S. at 136. The genesis of this principle can be traced at least to *Tumey v. Ohio*, 273 U.S. 510 (1927), a criminal case in which the Supreme Court held that if a judge had a "direct, personal, substantial pecuniary interest" in reaching a conclusion against a defendant, this would violate the defendant's right to due process. *Tumey*, 273 U.S. at 523; *see also New York State Dairy Foods, Inc. v. Northeast Dairy Compact Comm'n*, 198 F.3d 1, 13 (1st Cir. 1999), *cert. denied*, 529 U.S. 1098 (2000); *Esso Standard Oil Co. v. Cotto*, 389 F.3d 212, 218 (1st Cir. 2004) (citing *Gibson*, 411 U.S. at 578-79). Under one formulation, an interest is substantial if it "would offer a possible temptation to the average . . . judge to . . . lead him not to hold the balance nice, clear[,] and true." *New York State Dairy Foods, Inc.*, 198 F.3d at 13 (quoting *Ward v. Vill. of Monroeville*, 409 U.S. 57, 60 (1972)). "Participation of adjudicators who 'might conceivably have had a slight pecuniary interest,' however, does not offend due process." *Id.* (quoting *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 825 (1986)). This basic requirement applies to administrative agencies. *Gibson*, 411 U.S. at 579; *New York State Dairy Foods, Inc.*, 198 F.3d at 13.

Here, solely because three of the seven Board members are franchised dealers does not necessarily render the Board composition unconstitutional. Industry representation on regulatory boards is a "common and accepted practice." *New York State Dairy Foods, Inc.*, 198 F.3d at 13-14; *see also Friedman*, 440 U.S. at 18 (upholding such a scheme); *Stivers v. Pierce*, 71 F.3d 732, 743 (9th Cir. 1995) ("[T]he system of industry representation on governing or licensing bodies is an accepted practice throughout the nation."); *Abramson v. Gonzalez*, 949 F.2d 1567, 1579 (11th Cir. 1992) (although many licensed psychologists and members of the licensing

board are APA members, the plaintiffs have no right to a board composed of sympathetic examiners).[7]

b. *Friedman v. Rogers*

In *Friedman*, the Supreme Court considered a challenge to a statute establishing the Texas Optometry Board. Like the Board here, the Board in *Friedman* was comprised of a predetermined number of industry representatives. Four of the six members were "professional optometrists," and the remaining two were to be filled by "commercial optometrists." *Friedman*, 440 U.S. at 5-6. The plaintiff, a commercial optometrist, challenged the regulation of his profession by a board whose membership (professional optometrists) stood to gain directly by placing onerous restrictions on their competitors' practices. The Court rejected this claim, stating: "Although [the plaintiff] has no constitutional right to be regulated by a Board that is sympathetic to the commercial practice of optometry, he does have a constitutional right to a fair and impartial hearing in any disciplinary proceeding conducted against him by the Board." *Id.* at 18. Finding the latter right not implicated, the Court upheld the statute. In view of the Supreme Court's distinction between legislative and adjudicative functions, *Friedman*, although helpful, is

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[7] In *American Motors Sales Corp. v. New Motor Vehicle Board*, 138 Cal. Rptr. 594 (Cal. Ct. App. 1977), the California Court of Appeal distinguished between the California New Motor Vehicle Board and a licensing or regulatory agency, which may constitutionally be composed in whole or in part of members of the business regulated, on the ground that the car dealers were not regulating their own occupation, but rather were regulating their economic and contractual relations with car manufacturers. *Am. Motors Sales Corp.*, 138 Cal. Rptr. at 598-99. Be this as it may, the *American Motors* assertion that "car dealers have no unique or peculiar expertise appropriate to the regulation of business affairs of car manufacturers," *id.* at 599, overstates the point.

not dispositive here, since the Board's function is adjudicative, not regulatory.

c. *New York State Dairy*

In *New York State Dairy*, the First Circuit addressed an argument similar to the one Alliance makes here. Trade groups of milk producers outside New England sought to invalidate the authority of the Northeast Dairy Compact Commission on the ground, inter alia, that the composition of the Commission and the Hearing Panel, which consisted of New England dairy farmers, violated their due process rights.[8] Discussing the adjudicative function, the First Circuit observed: "The Due Process Clause inquiry is slightly more complicated with respect to the Hearing Panel. This is not, in contrast to the issuance of regulations, a mere legislative function. The Hearing Panel sits as a quasi-judicial adjudicative body, and thus must comport with a higher standard of due process." *New-York State Dairy Foods, Inc.*, 198 F.3d at 14. In examining the issue, *New York State Dairy* analyzed: 1) the degree of the potential financial interest on the part of individual panel members; 2) whether the Commission's own regulations provide due process safeguards; 3) whether the Commission members vote as individuals or as state delegates; and, 4) most significantly, whether there is a mechanism for disqualifying Commission members. *Id.* at 14-15. In this case, there is no evidence the Board has adopted any procedural regulations about the conduct of its hearings, although the law allows it to do so. *See* 10 M.R.S.A. § 1189

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[8] The First Circuit quickly dispatched the plaintiffs' claims regarding the Commission's legislative function, noting that the "Due Process Clause sets a significantly lower bar for legislative functions." *New York State Dairy Foods, Inc. v. Northeast Dairy Compact Comm'n*, 198 F.3d 1, 13 (1st Cir. 1999), *cert. denied*, 529 U.S. 1098 (2000). To the extent the Board here assumes legislative functions, the result would be the same.

("The hearing must be conducted pursuant to rules established by the board."). Further, the members apparently vote as individuals, not as delegates, a point that under *New York State Dairy*, favors Alliance.

On this record, however, this Court is left to speculate about the degree of the potential financial interest of the individual Board members. Alliance makes the bald statement that "[t]hree of the six normal voting members are dealers who have a financial incentive to vote against manufacturers." (*Pl.'s Mot. for Summ. J. & Supporting Mem. of Law* at 26 (Docket # 77)). But, contrary to Alliance's argument, this Court could as easily conclude that the impact of the financial incentive depends upon the nature of the dispute and the circumstances of the individual Board member. Would a childless automobile dealer in northern Maine have a "direct, personal and substantial" financial incentive to vote against the manufacturer in favor of a dealer in southern Maine regarding the right of a family member to succeed to the dealer's franchise under § 1174-C? Is the natural competition among dealers, a competition publicly aired with mind-numbing repetition by the dealers themselves, always going to be subordinated to their antagonism to the manufacturer?[9]

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[9] *American Motors* also made the point that, even if in an individual case, a dealer voted with the manufacturer because the terminated franchise was a competitor or because it wished to obtain an advantage with its manufacturer, this would not be fair, but only equally unfair. *Am. Motors*, 138 Cal. Rptr. at 596. The "objectionable feature" of dealer-membership on the board was "the distinct possibility that a dealer-manufacturer controversy will not be decided on its merits but on the potential pecuniary interest of the dealer-members." *Id.* at 596-57. Nevertheless, later in the opinion, the California Court of Appeal concluded, "we do not hold . . . that car dealers are biased solely because they are members of the dealer-class of litigants and are thus per se constitutionally ineligible to sit on the Board." *Id.* at 600. Rather, it was the combination

See Subaru of Am., Inc. v. State Bd. of Vehicle Mfrs., Dealers & Salespersons, 842 A.2d 1003, 1010 (Pa. Commw. Ct. 2004) (quoting *Am. Motors Sales Corp. v. New Motor Vehicle Bd.*, 138 Cal. Rptr. 594, 600 (1977)) (Regan, J., dissenting) ("It is sheer speculation to conclude, absent a finding of actual bias, that a dealer-member has a pecuniary interest antagonistic to the manufacturer in disputes between dealer and manufacturer.").

Finally, turning to the last *New York State Dairy* factor, Alliance is simply wrong in contending there is no provision under state law for disqualification of a conflicted Board member. Under the Maine APA, 5 M.R.S.A. § 9063, the hearings for any adjudicatory proceeding must be "conducted in an impartial manner," and, upon the filing in good faith by a party of a timely charge of bias or personal or financial interest, direct or indirect, the challenged person "shall determine the matter as a part of the record." 5 M.R.S.A. § 9063(1). This process has been used with inevitably varying results. *See New England Tel. & Tel. Co. v. Pub. Utils. Comm'n*, 448 A.2d 272 (Me. 1982); *Gashgai v. Bd. of Registration in Med.*, 390 A.2d 1080 (Me. 1978); *Fitzgerald v. Baxter State Park Auth.*, 385 A.2d 189 (Me. 1978). But, it is clearly available to the manufacturers.

On balance, as a facial attack on the constitutionality of the statute, and applying the *New York State Dairy* criteria, this Court concludes Alliance's argument fails.

d. Alliance's Case Law

Alliance relies upon *American Motors* and *Nissan Motor Corp. v. Royal Nissan, Inc.*, 757 F. Supp. 736 (E.D.

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of circumstances, including the mandated dealer-board members, the lack of any counterbalance in manufacturer members, the nature of the adversaries, and the nature of the controversies that rendered the board composition unconstitutional. *Id.*

La. 1991). In each case, the court held that the membership of several car dealers on the motor vehicle board deprived a manufacturer litigant of due process because the board was not impartial.[10] Neither case, however, survives analysis.

i. *American Motors*

In *American Motors*, the manufacturer attempted to terminate a dealership for failure to develop a sufficient sales volume. *Am. Motors Sales Corp.*, 138 Cal. Rptr. at 595. Following a hearing, the hearing officer found "good cause" for termination. *Id.* The New Motor Vehicle Board disagreed. *Id.* The California New Motor Vehicle Board is a nine-member board; four members are new car dealers and the remaining five are public members. Cal. Veh. Code § 3001(a), (b). Although required to include four dealers, the board has no required manufacturer representative. *Am. Motors Sales Corp.*, 138 Cal. Rptr. at 596. On appeal, the superior court held sections of the California Vehicle Code violated due process under the state and federal Constitutions. *Id.* at 595.

In a two to one decision, the California Court of Appeal affirmed. The majority noted that dealer members of the board had an economic stake in every franchise termination and that it was to each dealer's advantage not to permit termination for low sales performance. *Id.* at 596. The Court of Appeal stated that a new car dealer was not per se biased to a degree that he could not serve on the board, but the combination of the mandated dealer board members, the lack of any counterbalance in mandated manufacturer members, the nature of the adversaries, and the nature of the controversy did not furnish an impartial tribunal. *Id.* at 600. The court ob-

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[10] The Board here, unlike the boards in *American Motors* and *Nissan Motor Corp. v. Royal Nissan, Inc.*, 757 F. Supp. 736 (E.D. La. 1991), includes a manufacturer member.

served that the objectionable feature of dealer membership on the board was the distinct possibility that a dealer-manufacturer controversy would be decided not on its merits but on the potential interest of the dealer members. *Id.* at 596-97. "Because the challenged Board members have a 'substantial pecuniary interest' in franchise termination cases . . . their *Mandated* presence on the Board potentially prevented a fair and unbiased examination of the issues before it in this case, in violation of due process." *Id.* at 599 (emphasis added).

The controversy in California about the constitutionality of the New Motor Vehicle Board did not stop with *American Motors*. The California law provided that any existing automobile dealer could prevent the establishment or relocation of additional dealerships in the "same line-make" within ten miles of the dealership, initially by filing a protest and then by proving to the New Motor Vehicle Board that there is "good cause not to enter into a franchise establishing or relocating an additional motor vehicle dealership." *Chrysler Corp. v. New Motor Vehicle Bd.*, 153 Cal. Rptr. 135, 136 (Cal. Ct. App. 1979). Following *American Motors*, the California Legislature amended the statute to provide that no dealer could participate in a matter involving a protest. *Id.* at 137. Shortly thereafter, a three-judge panel of the federal district court held the ability of a dealer to prevent the establishment of a new competitor by filing a protest was a violation of due process. *Orrin W. Fox Co. v. New Motor Vehicle Bd.*, 440 F. Supp. 436 (C.D. Cal. 1977). The United States Supreme Court reversed. *New Motor Vehicle Bd. of California v. Orrin W. Fox Co.*, 439 U.S. 96 (1978).[11]

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[11] *Fox*, in passing, described the California New Motor Vehicle Board as "an impartial tribunal." *Orrin W. Fox Co.*, 439 U.S. at 108.

In 1979, the California Legislature reversed itself and provided that the dealer-members "may participate in, hear, and comment or advise other members upon, but may not decide" any matter involving a dealer-manufacturer dispute. *See British Motor Car Distribs., Ltd. v. New Motor Vehicle Bd.*, 239 Cal. Rptr. 280, 283 (Cal. Ct. App. 1987). But, this amendment met "a chilly reception" by the courts. *Id.* The board, in response, voluntarily began a policy of having all dealer members recuse themselves prior to any discussion of a grievance, *id.*, but even this was deemed insufficient. *Univ. Ford Chrysler-Plymouth, Inc. v. New Motor Vehicle Bd.*, 224 Cal. Rptr. 908 (Cal. Ct. App. 1986).

In 1985, the California Legislature acted again. It amended the law to provide that "[a] member of the board who is a new motor vehicle dealer *may not participate in, hear, comment, advise other members upon, or decide* any matter considered by the board" which involves a dispute between a dealer and a manufacturer. *British Motor Car Distribs., Ltd.*, 239 Cal. Rptr. at 283-84. Finally, in 1986, the California Court of Appeal ruled this amended version of the statute constitutional. *Am. Isuzu Motors, Inc. v. New Motor Vehicle Bd.*, 230 Cal. Rptr. 769 (Cal. Ct. App. 1986).

This extended history is of interest, because in the last analysis, when the statute was amended to provide for dealer member recusal, the California Court of Appeal upheld the statute's constitutionality. If mandatory dealer recusal ultimately satisfied the constitutional concerns of the California Court of Appeal, this Court must assume that case specific recusal pursuant to Maine statute would satisfy similar concerns. At the very least, in the context of a facial challenge, this Court cannot presume Maine courts would fail to enforce the bias provisions of Maine law.[12] *See* 5 M.R.S.A.

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[12] This is not to imply that dealers as a class have an impermissible conflict whenever addressing any aspect of any possible dealer-

§ 9063(1); *see also Rite Aid Corp. v. Bd. of Pharmacy*, 421 F. Supp. 1161, 1169-71 (D. N.J. 1976), *appeal dismissed*, 430 U.S. 951 (1977) (three-judge panel rejects facial attack on New Jersey state pharmacy board composed of independent pharmacists).

ii. *Royal Nissan*

In *Royal Nissan*, Nissan Motor Corporation sought a preliminary injunction to prevent the members of the Louisiana Motor Vehicle Commission from holding a hearing relating to a complaint by two dealers against Nissan's plans to establish a new dealership in Louisiana. *Royal Nissan, Inc.*, 757 F. Supp. at 737. The nine-member Louisiana Commission

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manufacturer dispute. Even *American Motors* did not go that far. It is only to point out that this Court is required to presume the legislative act constitutional. It may or may not be that an individual dealer confronting a specific issue has an impermissible conflict under 5 M.R.S.A. § 9063(1). *See Rite Aid Corp. v. Bd. of Pharmacy*, 421 F. Supp. 1161, 1170, n. 18 (D. N.J. 1976), *appeal dismissed*, 430 U.S. 951 (1977) ("While we see nothing on the face of N.J.S.A. 45:14-1 which violates due process, we, of course, do not foreclose the plaintiffs from arguing that an individual Board member has a substantial pecuniary interest or bias in the outcome of any Board proceeding.").

Moreover, this analysis assumes *arguendo* the validity of the *American Motors* line of cases. The *American Motors* case has been subjected to thorough criticism, *see, e.g., Subaru of Am., Inc. v. State Bd. of Vehicle Mfrs., Dealers & Salespersons*, 842 A.2d 1003, 1009-10 (Pa. Commw. Ct. 2004); *Gen. Motors Corp. v. Capitol Chevrolet Co.*, 645 S.W.2d 230, 232 (Tenn. 1983), and other state courts have concluded similar statutes are constitutional, *see, e.g., Gen. GMC Trucks, Inc. v. Gen. Motors Corp.*, 237 S.E.2d 194, 195-97 (Ga. 1977), *cert. denied*, 434 U.S. 996 (1977); *Ford Motor Co. v. Pace*, 335 S.W.2d 360, 367-69 (Tenn. 1960), *appeal dismissed*, 364 U.S. 444 (1960), *reh'g denied*, 364 U.S. 939 (1961).

consisted only of dealers, and the district court concluded that the dealers' interest "lays in preventing the manufacturer from creating another dealership that cuts into the existing dealers' market area." *Id.* at 740. The court stated it could think of "no interest that the dealers would have in allowing Nissan to limit their market area and to create new competition." *Id.* The district court granted a preliminary injunction.[13] *Id.* at 740-41.

One significant difference between the Louisiana board in *Royal Nissan* and the Board here is that in Louisiana, the nine-member board consisted only of dealers; whereas, in Maine, the Board has a majority of non-dealer members. In Maine, even assuming the dealers voted as a bloc and the manufacturer always voted with its perceived interest, because the chair does not vote except to break a tie, the dealers must convince at least one of the public members to vote with them to obtain a majority.[14] If the two public members were to vote with the manufacturer, the resulting tie would be broken by the chair, an attorney employed by the Maine Secretary of State.

It is noteworthy that the *Royal Nissan* decision distinguishes its facts from a prior Fifth Circuit case, *Chrysler Corp. v. Texas Motor Vehicle Commission*, 755 F.2d 1192 (5th Cir. 1985), *reh'g denied*, 761 F.2d 695 (5th Cir. 1985). *See Royal Nissan, Inc.*, 757 F. Supp. at 740. In *Chrysler*, the Fifth Circuit, addressing the perennial issue of warranty reimbursements, pointed out:

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[13] There was no appellate review of the merits of Judge Mentz's decision in *Royal Nissan*.

[14] This illustration assumes all members are present. There are, of course, a number of permutations depending on who is present at any given hearing.

> The predictors of bias here point in opposite directions. Perhaps the dealers on the Commission will be unsympathetic to manufacturers who contend that a claimed defect was only an inept repair effort by a dealer. Yet, we can equally speculate, if we are to speculate, that a dealer will be quick to find fault with his direct competitor—the dealer.

Chrysler Corp., 755 F.2d at 1199. Under *Chrysler*, if the Maine Board were faced with a dealer warranty dispute, (ironically the dispute that underlies this law suit), the Fifth Circuit would conclude there is no inherent dealer bias.

e. Due Process Conclusion

Royal Nissan and *American Motors* involved "as applied" challenges to their state boards; neither was a facial assault on their overall constitutionality. Even if courts under different schemes concluded that boards with dealer members could not properly decide specific issues of dealer termination and new competitive dealerships, this is scant authority for a wholesale declaration that the Board in Maine is fatally flawed for all purposes. *See Gen. Motors Corp. v. Capitol Chevrolet Co.*, 645 S.W.2d 230, 237 (Tenn. 1983); *Gen. GMC Trucks, Inc. v. Gen. Motors Corp.*, S.E.2d 194, 195-97 (Ga. 1977), *cert. denied*, 434 U.S. 996 (1977); *Ford Motor Co. v. Pace*, 335 S.W.2d 360, 367-69 (Tenn. 1960), *appeal dismissed*, 364 U.S. 444 (1960), *reh'g denied*, 364 U.S. 939 (1961).

Like the Fifth Circuit in *Chrysler*, this Court cannot draw the conclusion based on this record that the personal financial circumstances of each dealer member on the Board will invariably cause them to unite against the manufacturers on all issues. The possibility the Board would not conduct a fair and impartial hearing is an argument grounded on unwarranted speculation, and this record falls far short of demon-

strating, as required by *Salerno*, "no set of circumstances" under which the act could be valid.[15]

IV. CONCLUSION

Defendants' Motion for Summary Judgment is GRANTED, and Plaintiff's Motion for Summary Judgment is DENIED.

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[15] On December 21, 2004, Amicus Curiae, Maine Auto Dealers Association, brought to this Court's attention the First Circuit decision, *Esso Standard Oil Co. v. Cotto*, 389 F.3d 212 (1st Cir. 2004). *Esso Standard Oil* considered the abstention doctrine in *Younger v. Harris*, 401 U.S. 37 (1971) to determine whether a federal court should issue an injunction based on allegations of bias against a state administrative agency despite an ongoing state proceeding. None of the parties has raised an abstention argument here and there is no ongoing state proceeding. *Esso Standard Oil* is inapposite.

APPENDIX C

United States District Court,
D. Maine.

ALLIANCE OF AUTOMOBILE MANUFACTURERS,
Plaintiff,

v.

DAN A. GWADOSKY, ET AL.,
Defendants.

No. CIV.03-154-B-W.

Feb. 13, 2004.

ORDER ON PLAINTIFF ALLIANCE OF AUTOMOBILE MANUFACTURERS' MOTION FOR PRELIMINARY INJUNCTION

WOODCOCK, District Judge.

On September 4, 2003, Alliance of Automobile Manufacturers (Manufacturers) filed a complaint with this court for declaratory and injunctive relief against Dan A. Gwadosky in his official capacity as Secretary of State of the State of Maine and G. Steven Rowe in his official capacity as Attorney General of the State of Maine (State). The Complaint seeks a declaration that Sections 10 and 12 of newly enacted L.D. 1294 are unconstitutional and an order preliminarily and permanently enjoining their enforcement. On October 9, 2003, the Maine Auto Dealers Association (Dealers) filed a motion for *amicus curiae* "plus" status and on December 22, 2003, the Court granted the Motion in part. On October 10, 2003, the State answered the complaint, denying its essential allegations. With the filing of the complaint, Manufacturers moved for a Preliminary Injunction against the enforcement of Section 10 of Maine Legislative Document 1294 (L.D.1294). On October 10, 2003, the State filed an objection to the issuance of a preliminary injunction.

I. Statement of Facts

To rule on this motion, it is necessary to reiterate the long, complex, and litigious history leading up to the enactment of L.D. 1294 and the filing of this case.[1] The two major players, the Manufacturers and the Dealers, have been engaged for nearly three decades in Maine in an elaborate and contentious game of economic, political, and legal chess.[2] The battle lines in this dispute have been drawn over how much money the Dealers will receive back from the Manufacturers when performing work under manufacturer warranty. There is substantial money at stake. During the year 2002, one manufacturer, Ford, imposed a price adjustment of $500 on each new car sold in Maine and, as a result, received back slightly more than $3.6 million dollars in that year alone. If other manufacturers follow Ford's lead, the dollars could prove serious.

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[1] In its recitation of facts, the Court has borrowed freely from the facts as set forth in the opinions of the First Circuit, the Maine Supreme Judicial Court, and Judges D. Brock Hornby, and the late Morton A. Brody of this Court.

[2] It should come as no surprise that Maine is not alone. Litigation has percolated on a variety of issues involving manufacturer-dealer warranty reimbursement in New Jersey (*New Jersey Coalition of Auto. Retailers v. DaimlerChrysler Motors Corp.*, 107 F. Supp. 2d 495 (D. N.J. 1999)), (*Liberty Lincoln-Mercury v. Ford Motor Co.*, 134 F.3d 557 (3rd Cir. 1998)); in New York (*Ralph Oldsmobile v. General Motors Corp.*, 2000 WL 1459767, 2000 U.S. Dist. LEXIS 14244 (S.D.N.Y. 2000)), (*G/C Volkswagen Corp. v. Volkswagen of America, Inc.*, 1998 WL 799174, 1998 U.S. Dist. LEXIS 17987 (S.D.N.Y. 1998)); in Vermont (*Northwood AMC Corp. v. American Motors Corp.*, 423 A.2d 846 (Vt. 1980)); in Illinois (*Kronon Motor Sales v. Ford Motor Co.*, 41 F.3d 338 (7th Cir. 1994)); in Ohio (*Jim White Agency Co. v. Nissan Motor Corp.*, 126 F.3d 832 (6th Cir. 1997)); and in Florida (*Brandon Chrysler Plymouth Jeep Eagle, Inc. v. Chrysler Corp.*, 898 F. Supp. 858 (M.D. Fla. 1995)).

The public tends to see the dealer-manufacturer relationship as symbiotic and unitary: the manufacturer designs and builds vehicles; the dealer sells and repairs them, all to their greater economic advantage. Beneath the surface, however, is an uneasy, often roiling relationship. Since the parties themselves have been unable over the course of the last three decades to negotiate satisfactorily their conflicting positions in the warranty reimbursement area, they have each periodically sought to enlist the support of the legislative and judicial arms of government. Each legislative action has been followed by resort to the judicial branch, spawning new legislation and new judicial rulings, a seemingly never ending cycle, perfectly exemplified by the instant case. *See, e.g., Darling's v. Ford Motor Company*, 2003 ME 21, 825 A.2d 344; *Acadia Motors v. Ford Motor Co.*, 2002 ME 102, 799 A.2d 1228; *Nissan Motor Corp. In U.S.A. v. Darling's Honda/Nissan*, 1999 Me. Super. LEXIS 190 (Me. Super. Ct. July 7, 1999); *Darling's d/b/a Darling's Bangor v. Ford Motor Co.*, 1998 ME 232, 719 A.2d 111; *American Honda Motor Co. v. Darling's Honda/Nissan*, 1997 Me. Super. LEXIS 225 (Me. Super.Ct. July 27, 1997); *Darling's d/b/a Darling's Bangor v. Ford Motor Co.*, No. 95-CV-398-B-H (Me. D.1995); *Acadia Motors v. Ford Motor Co.*, 844 F. Supp. 819 (D. Me. 1994), *aff'd in part, rev'd in part on other grounds*, 44 F.3d 1050 (1st Cir. 1995); *Darling's Bangor Ford/VW/Audi v. Ford Motor Co.*, 92-SC-229 (Me. Dist. Ct. 3, S. Pen., Oct. 20, 1992).

Alliance is a trade association of ten car and light truck manufacturers.[3] Its members account for more than 90% of all motor vehicle sales in the United States. *Amicus curiae* "Plus" Dealers is a trade association, representing Maine's

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[3] These members include: BMW Group, DaimlerChrysler, Ford Motor Co., General Motors, Mazda, Mitsubishi Motors, Nissan, Porsche, Toyota, and Volkswagen.

automobile dealers, all of whom are franchisees of one or more of Alliance's members. The legal relationship between Manufacturers and Dealers is defined in a Sales and Service Agreement (Agreement). When a new vehicle is sold in the United States, the Manufacturer issues a warranty of free labor and parts for certain repairs, replacements or adjustments during the term of the warranty. Under the Agreement, the Dealers are required to perform warranty work and the Manufacturers are required to reimburse the Dealers for parts used and labor performed.

By its nature, work performed by one party that the other must reimburse is a potential source of controversy. The Agreement typically contains extremely explicit rules to clarify reimbursement practices. In Ford's case, reimbursement levels are established by specific national reimbursement formulae both for parts and labor. Under the terms of the Ford Agreement, for example, the time component of labor is reimbursed based upon standard hours generated by Ford's own analysis of the time it should take to complete each specific repair, not the amount of time the Dealer says the repair actually took.

The Dealers have rankled at the Manufacturers' warranty reimbursement rates. They claim the reimbursement rates for warranty work are significantly below retail rates for non-warranty work. Viewing all repair work, both warranty and non-warranty, as a whole, the Dealers posit that they are required to make up the Manufacturers' stinginess by increasing prices for non-warranty work. As a consequence, the Dealers argue the Manufacturers are mandating that non-warranty customers, who pay retail rates, must subsidize the Manufacturers, who do not. To the argument that the Dealers are receiving reimbursement at rates they bargained for and agreed to, the Dealers point to the overpowering economic weight of the Manufacturers, which they claim forces them to

accept parsimonious reimbursement rates.[4] By contrast, the Dealers argue retail customers for non-warranty work have no such leverage and end up paying what the Manufacturers will not. In response, the Manufacturers have used a mirror argument, pointing to the national market for automobiles and claiming that consumers outside Maine will be required to pay higher prices for warranty work to make up for the extra money the Manufacturers must reimburse Dealers in Maine.

The Dealers have successfully sought legislative intervention. In 1975, the State of Maine first began to regulate the price manufacturers must pay to Maine car dealers for repairs made under manufacturer warranty. Pub. L. 1975 Ch. 573, § 1176. The statute contained the relatively benign provision that manufacturers must "adequately and fairly compensate each of its motor vehicle dealers for parts and labor." 10 M.R.S.A. § 1176 (1975). In 1979, the Maine Legislature acted again. This time it enacted a provision by which a

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[4] Judge Brody in *Acadia Motors*, 844 F. Supp. at 825 n. 7 quoted the following congressional statement on the manufacturer-dealer relationship:

> [The] vast disparity in economic power and bargaining strength has enabled the manufacturer determine arbitrarily the rules by which the two parties conduct their business affairs. These rules are incorporated in the sales agreement or franchise which the manufacturer has prepared for the dealer's signature. Dealers are with few exceptions completely dependent on the manufacturer for their supply or cars. When the dealer has invested to the extent required to secure a franchise, he becomes in a real sense the economic captive: of his manufacturer . . . . The faults of the factory-dealer system are directly attributable to the superior market position of the manufacturer.

S. Rep. No. 2073, 84th Cong., 2d Sess., 2 (1956).

dealer could collect attorney's fees in the event the dealer was successful in a legal action for a claim for warranty reimbursement the manufacturer had denied. Pub. L. 1979, Ch. 498, § 3.

In 1980, the Maine Legislature repealed the 1975 statute and replaced it with a new provision that continued to require Manufacturers to "adequately and fairly compensate" the dealers for parts, but mandated they reimburse Dealers for any labor "at the retail rate customarily charged by that (dealer) for the same labor when not performed in satisfaction of a warranty." P.L. 1975, Ch. 698, § 1. In 1991, the Legislature amended the statute to require parts reimbursement for warranty work to be made "at the retail rate customarily charged by that (dealer) for the same parts when not provided in satisfaction of a warranty." P.L. 1991, Ch. 328. As of October 9, 1991, the effective date of the 1991 law, the Manufacturers were mandated as a matter of Maine statutory law to reimburse Maine Dealers for both parts and labor for warranty work at rates the Dealers charged non-warranty customers.

This did not sit well with the Manufacturers. One manufacturer, Ford, simply ignored the law and continued to reimburse its dealers at lower rates. In 1992, Darling's resorted to Small Claims Court to compel compliance with the reimbursement requirements of § 1176. The Small Claims Court dismissed the claim because Darling's had failed to submit an adequate claim for reimbursement to Ford. *Darling's Bangor Ford/VW/Audi*, 92-SC-229 (Me. Dist. Ct. 3, S. Pen.) (Oct. 20, 1992).

On April 1, 1993, Ford announced a new policy. It agreed to reimburse its Maine Dealers at what amounted to retail rates, but at the same time, it stated that in order to recover this increase in costs, it would surcharge approximately $160 per vehicle, thereby increasing the wholesale price for each new Ford vehicle sold in Maine. This surcharge, termed

a "warranty parity surcharge," appeared on each dealer's monthly parts invoice in the month following the sale. The surcharge was imposed based on the number of vehicles sold, without regard to whether the dealer actually performed warranty work in that month. The surcharge was imposed on Maine dealers only.

In 1993, the Dealers brought suit in this Court, claiming the surcharge violated Maine statutory law. *Acadia Motors*, 44 F.3d at 1055. The First Circuit ruled that § 1176 did not restrict the Manufacturers from recovering their compliance costs:

> Noting in the language of section 1176 prohibits a manufacturer from increasing vehicle prices in order to recover its increased compliance costs. The statute says nothing about wholesale or retail prices, and apparently leaves the manufacturer free to increase wholesale prices, and the dealer to increase retail prices.

Id. Despite its victory, Ford discontinued the surcharge and did not immediately re-impose it.

A brief period of quiescence followed the First Circuit opinion. It was not to last. Later in 1995, Darling's initiated suit against Ford, presenting a host of issues for judicial resolution. On April 1, 1998, Judge Hornby certified a series of questions of state law to the Maine Supreme Judicial Court pursuant to 4 M.R.S.A. § 57 and M. R. Civ. P. 76B. The Maine Law Court responded on October 28, 1998. *Darling's d/b/a Darling's Bangor Ford*, 1998 ME 232, 719 A.2d 111. The parties ultimately and uncharacteristically settled the dispute. *See Acadia Motors, Inc.*, 2002 ME 102, ¶ 7, 799 A.2d 1228.

In 1999, Ford informed the Dealers it would re-impose the warranty parity surcharge of $150 (later $250) for each vehicle sold or leased in Maine to recover the costs of compliance with § 1176 and the costs of the settlement it had in-

curred in the *Darling* suit. *Acadia*, 2002 ME 102, ¶ 7, 799 A.2d at 1230. The result was predictable. On August 10, 1999, a large number of individual Maine auto dealers filed suit in State Superior Court seeking a declaratory judgment that the surcharge violated § 1176. Again, the result was predictable. On June 25, 2002, the Maine Supreme Judicial Court agreed with the First Circuit Court of Appeals and ruled that the Maine statute "contains no language restricting or conditioning Ford's ability to recover its costs of compliance." *Id.* 2002 ME 102, ¶ 11, 799 A.2d at 1230.

The Dealers turned once more to the Maine Legislature and in 2003, the Legislature acted. The result is L.D. 1294 and the pending lawsuit. Section 10 of L.D. 1294 provides in part: "A [manufacturer] may not otherwise recover its costs for reimbursing a [dealer] for parts and labor pursuant to this section." This statutory provision appears to plug the hole in the law the First Circuit and the Maine Supreme Judicial Court determined existed in earlier versions. The Manufacturers have now turned to this Court for relief from the newly enacted Maine law.

II. Discussion

This Court must apply a familiar four-part test to determine whether injunctive relief is appropriate: first, the likelihood of success on the merits; second, the potential for irreparable harm, if the injunction is denied; third, the balance of relevant impositions; and, four, the effect of the court's ruling on the public interest. *Ross-Simons of Warwick v. Baccarat*, 102 F.3d 12, 15 (1st Cir. 1996), *accord Rosario-Urdaz v. Rivera-Hernandez*, 350 F.3d 219 (1st Cir. 2003); *Narragansett Indian Tribe v. Guilbert*, 934 F.2d 4, 5 (1st Cir. 1991).

A. Likelihood of Success

Alliance's Motion for Preliminary Injunction is grounded on the assertion that Section 10 of L.D. 1294 is unconstitu-

tional. Although the Complaint attacks both Section 10 and Section 12 of L.D. 1294, Alliance's Motion for Preliminary Injunction is directed only against Section 10. The Motion asks this Court to enjoin enforcement of Section 10 pending the final resolution of this lawsuit. The Complaint challenges the constitutionality of Section 10 on three grounds: (1) that it violates the Commerce Clause; (2) that it violates the Contracts Clause; and, (3) that it violates the Takings Clause.[5] The Court will limit its discussion to the Commerce and Contracts Clauses. In evaluating Alliance's claims of constitutional infirmity, this Court is required to presume the challenged act is constitutional. *Davies Warehouse Co. v. Bowles*, 321 U.S. 144, 153 (1944) ("State statutes, like federal ones, are entitled to the presumption of constitutionality until their invalidity is judicially declared.").

1. Commerce Clause

Under the United States Constitution, Article I, section 8, Congress has the power "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes." U.S. Const. Art. I, section 8, cl. 3. In matters not governed by federal legislation, "the Clause has long been understood to have a 'negative' aspect that denies the States the power unjustifiably to discriminate against or burden the interstate flow of articles of commerce." *Oregon Waste Systems, Inc. v. Department of Environmental Quality*, 511 U.S. 93, 98 (1994); *Wyoming v. Oklahoma*, 502 U.S. 437, 454 (1992); *Welton v. Missouri*, 91 U.S. 275 (1876). This "negative command, known as the dormant Commerce Clause, prohibits states from acting in a manner that burdens the flow of interstate commerce." *Pharm. Research & Mfrs. of Am. v. Concannon*, 249 F.3d 66, 79 (1st Cir. 2001) (hereinafter

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[5] At oral argument, Alliance waived the Takings Clause claim for purposes of the Motion for Preliminary Injunction.

PhaRMA), *aff'd sub nom. Pharm. Research & Mfrs. Of Am. v. Walsh*, 538 U.S. 644 (2003).

Alliance alleges that Section 10 of L.D. 1294 violates the Commerce Clause by "burdening interstate commerce through extraterritorial regulation of the wholesale prices of motor vehicles; purposefully discriminating against out-of-state manufacturers, motor vehicle dealers and consumers and favoring in-state motor vehicle dealers and consumers; and, by having a practical effect that imposes a heavier burden on out-of-state manufacturers, dealers and consumers than on in-state dealers and consumers." *Pl.'s Complaint* at 50.

a. Extraterritorial Regulation

Alliance claims that Section 10's prohibition from recovering warranty costs extends beyond the boundaries of the State of Maine. It contends that under the "plain and ordinary meaning" of Section 10, the Alliance's members "cannot raise prices *in any state* for the purpose of recovering the costs of complying with Section 1176." *Pl.'s Mot. For Preliminary Injunction* at 13. Alliance asserts that its members could not require reimbursement of dealers in Michigan without running afoul of Maine law. Having raised the spectre of "extraterritorial reach," Alliance urges this Court to conclude that the Section 10 is a per se violation of the Commerce Clause. *See PhaRMA*, 249 F.3d at 79.

Alliance's argument misses the mark. In construing the territorial reach of Section 10, this Court is obligated to apply "the elemental rule" that "every reasonable construction must be resorted to, in order to save a statute from unconstitutionality." *Hooper v. California*, 155 U.S. 648, 657 (1895). When faced with two possible constructions of a statute, one of which would raise "serious constitutional problems" while the other would not, the Court is required to construe the

statute to avoid such problems. *Immigr. & Naturalization Serv. v. St. Cyr*, 533 U.S. 289, 299-300 (2001).

Justice Cardozo, writing for the Supreme Court in *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 521 (1935) observed that "New York has no power to project its legislation into Vermont by regulating the price to be paid in that state for milk acquired there." Section 10, however, makes no such attempt. In concluding that the Maine Rx Program did not constitute impermissible extraterritorial regulation, the Supreme Court quoted the First Circuit with approval:

> the Maine Act does not regulate the price of any out-of-state transaction, either by its express terms or by its inevitable effect. Maine does not insist that manufacturers sell their drugs to a wholesaler for a certain price. Similarly, Maine is not tying the price of its in-state products to out-of-state prices.

PhaRMA, 123 S. Ct. at 1871.

Despite Alliance's vigorous arguments to the contrary, this Court does not interpret Section 10 of L.D. 1294 as attempting to reach outside Maine borders and restrict what the manufacturers reimburse dealers in other states. Section 10 does not "regulate the price of any out-of-state transaction, either by its express terms or inevitable effect." It does not insist that manufacturers set their warranty reimbursements outside of Maine at "a certain price." It does not attempt to tie the level of warranty reimbursement in Maine "to out-of-state prices." The Manufacturers' argument that what they lose from Maine dealers, they must collect from out-of-state dealers is bottomed on the fallacy that they have a constitutional right to a particular national rate of return from warranty repairs.

Moreover, in the Act itself, the Maine Legislature itself fully stated its legislative aim to address Maine transactions. *See PhaRMA*, 249 F.3d at 97 (concurrence). The Maine Leg-

islature has declared in detail its intent in enacting regulations of business practices among motor vehicle manufacturers, distributors and dealers:

> The Legislature finds that the manufacture, distribution and sale of motor vehicles in the State vitally affects the general economy of the State and the public interest and public welfare; that the manufacturers of motor vehicles whose physical manufacturing facilities are not located within the State and distributors are doing business in the State through their control over and relationship and transactions with their dealers in the State; that the geographical location of the State makes it necessary to ensure the availability of motor vehicles and parts and dependable service for motor vehicles throughout the State to protect and preserve the transportation system, the public safety and welfare and the investments of its residents. The Legislature declares, on the basis of these findings, that it is necessary to regulate and to license motor vehicle manufacturers and distributors and their branches and representatives, motor vehicle dealers and any other persons engaged in the business of selling or purchasing vehicles in the State in order to prevent frauds, impositions and other abuses against residents and to protect and preserve the economy, the investments of residents, the public safety, and the transportation system of the State.

10 M.R.S.A. § 1182. Although enacted in 1997 before the passage of L.D. 1294, this public policy statement is contained within the same subchapter and sets forth the Legislature's rationale for regulating the manufacturer-dealer relationship; Section 10 is part of this regulatory scheme. The Maine Legislature should be taken at its word that its manufacturer-dealer laws are intended to apply in Maine to Maine public policy issues. In the words of the First Circuit, "it cannot be proper for a federal court to make judicial 'find-

ings' contrary to Maine's legislative declarations and on that basis declare that Maine's Act is invalid." *PhaRMA*, 249 F.3d at 97 (concurrence).

In short, this Court concludes that Section 10 is does not have an extraterritorial reach violative of the Commerce Clause of the United States Constitution.

b. Discrimination Against Out-Of-State Commerce

Alliance next claims Section 10 constitutes a *per se* violation of the Commerce Clause, because it discriminates against interstate commerce and favors in-state economic interests over out-of-state interests. It alleges that Section 10's "purpose is to transfer wealth exclusively from out-of-state manufacturers, dealers and consumers to in-state dealers." *Pl.'s Mot.* at 17. This argument is unpersuasive. In reviewing whether a state statute violates the Commerce Clause, the first step is to determine whether it "regulates evenhandedly with only 'incidental' effects on interstate commerce, or discriminates against interstate commerce." *Oregon Waste Systems, Inc.*, 511 U.S. 93, 98 (1994) (quoting *Hughes v. Oklahoma*, 441 U.S. 322, 325-26 (1979)); *Ford Motor Co. v. Texas Dept. of Transp.*, 264 F.3d 493, 499 (5th Cir. 2001). A statute discriminates against interstate commerce when it provides for "differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Oregon Waste*, 511 U.S. at 99; *see also Ford Motor*, 264 F.3d at 499. If a state statute discriminates against interstate commerce, "strict scrutiny" is applied under a "virtually per se invalid rule." *PhaRMA*, 249 F.3d at 79.

The Commerce Clause does not invalidate all state regulation that has a disparate impact on out-of-state economic interests. Instead, it looks to whether in-state business entities are favored over similarly situation out-of-state entities. *Ford Motor*, 264 F.3d at 500. The case of *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978) is illustrative.

In *Exxon*, a Maryland statute provided that a producer or refiner of petroleum products could not operate any retail gas station within the State and had to extend all "voluntary allowances" uniformly to all services stations it supplied. Exxon challenged the statute based in part on an asserted violation of the Commerce Clause. Justice Stevens made short work of Exxon's argument:

> Plainly, the Maryland statute does not discriminate against interstate goods, nor does it favor local producers and refiners. Since Maryland's entire gasoline supply flows in interstate commerce and since there are no local producers or refiners, such claims of disparate treatment between interstate and local commerce would be meritless.

Exxon, 437 U.S. at 125.

To posit the opposite example, in *Lewis v. BT Investment Managers, Inc.*, 447 U.S. 27 (1980), the Supreme Court declared a Florida statute violative of the Commerce Clause because it favored Florida-based banks, bank holding companies, and trust companies over those same companies with principal operations outside of Florida. *Lewis*, 447 U.S. at 42. The *Lewis* Court distinguished *Exxon*: "The Court [in Exxon] concluded that the statute could not discriminate against interstate petroleum producers and refiners in favor of locally based competitors because, as a matter of fact, there were no such local producers or refiners to be favored." *Lewis*, 447 U.S. at 40-41.

This leads us back to *PhaRMA*. Judge Hornby easily dispatched the claim of instate versus out-of-state discrimination:

> There are no Maine drug manufacturers, and no suggestion on this record that Maine is in the process of trying to establish a favorable environment to bring them here. Instead, the rebate program applies to any manufacturer,

> whether or not it is from Maine. Maine is trying to benefit its residents, specifically those who are uninsured, in the purchase of prescription medicines; but it is not trying to better their lot over out-of-staters. So the question is not whether Maine is discriminating against out-of-staters, but simply whether it has the power to extend its authority to out-of-state manufacturers.

Pharm. Research & Mfg. of Am. v. Comm'r, 2000 U.S. Dist. LEXIS 17363 (hereinafter *PhaRMA*). *PhaRMA* did not even raise this argument before the First Circuit. *PhaRMA*, 249 F.3d at 83 (noting "Pharma does not contend, nor did the district court find, that the Maine Act discriminates on its face or in its effects. Therefore, we need not discuss it further."). The Supreme Court simply noted that the "Maine Rx Program will not impose a disparate burden on any competitors. A manufacturer could not avoid its rebate obligation by opening production facilities in Maine and would receive no special benefit to competitors of rebate-paying manufacturers." *PhaRMA*, 123 S. Ct. at 1871.

Applying these principles, Section 10 of L.D.1294 does not discriminate against out-of-state manufacturers, because as a matter of fact, there are no in-state manufacturers to be favored. *General Motors Corp. v. Tracy*, 519 U.S. 278, 299 (1997) ("[I]n absence of actual or prospective competition between the supposedly favored and disfavored entities *in a single market* there can be no local preference, whether by express discrimination against interstate commerce or undue burden upon it, to which the dormant Commerce Clause may apply.") (emphasis added); *Alliance of Auto. Mfgrs. v. Kirkpatrick*, 2003 WL 21684464 at *8, 2003 U.S. Dist. LEXIS 12323 at *29 ("Recent Supreme Court precedent has strongly suggested that Commerce Clause claims of the kind at issue here [alleged protectionism] cannot jump across markets . . . .")

To the extent the "local benefit" or "subsidy" category of cases applies, the State urges the Court to conclude that the recoupment prohibition is "too far afield from . . . protectionism" to constitute a per se violation of the Commerce Clause. *Def.'s Mem.* at 13 (quoting *Fireside Nissan v. Fanning*, 30 F.3d 206, 217 (1st Cir. 1994)). Based on the record before it, the Court agrees with the State that the degree of local benefit and its impact on out-of-state businesses is speculative, at best.

c. *Pike v. Bruce Church*

If the statute does not have an impermissible extraterritorial reach and does not discriminate against out-of-state commerce, then the third leg of the analysis is the balancing test under *Pike v. Bruce Church*, 397 U.S. 137 (1970). At oral argument, counsel for Alliance stated that it is "not making a *Pike v. Bruce Church* argument" and therefore, the Court will not address this final Commerce Clause analytic framework.

2. Contracts Clause

Alliance asserts that Section 10 of L.D. 1294 violates the Contracts Clause of the United States Constitution. U.S. Const. Art. I, section 10, cl. 1. The Contracts Clause provides: "No State shall . . . pass any . . . law impairing the Obligation of Contracts." *Id.* As the Supreme Court has explained, although the language of the Contract Clause "is facially absolute, its prohibition must be accommodated to the inherent police power of the State 'to safeguard the vital interests of its people.'" *Energy Reserves Group v. Kan. Power & Light Co.*, 459 U.S. 400, 410 (1983) (quoting *Home Bldg. & Loan Assn. v. Blaisdell*, 290 U.S. 398, 434 (1934)).

This is not the first time this Court has visited this issue. In 1994, Judge Brody addressed a Contract Clause allegation in the warranty reimbursement context and in 1998, Judge Hornby ruled that Judge Brody's decision was "the final de-

cision for purposes of collateral estoppel." *Acadia Motors*, 844 F. Supp. at 823-28; *Darling's v. Ford*, Civil No. 95-398-B-H at 7. As Ford Motor Company was pressing the issue in the *Acadia Motors* and *Darling's* cases and is not a party to the instant action, this Court cannot give Judge Brody's 1994 decision preclusive effect. *Dennis v. R.I. Hosp. Trust Nat'l Bank*, 744 F.2d 893, 899 (1st. Cir. 1984). Nevertheless, Judge Brody's reasoning is persuasive.

The first step in a Contracts Clause analysis is whether the Legislature intended the law to apply to pre-existing contracts. Neither party has asserted that L.D. 1294 has only prospective application and this is consistent with Judge Brody's determination in 1994 that the 1991 amendments to the warranty reimbursement statute were to be applied to warranty work performed after the effective date of the statute "regardless of when the underlying franchise agreement was executed." *Acadia Motors*, 844 F. Supp. at 826. This Court accepts the implicit view that the provisions of Section 10 of L.D. 1294 apply to warranty work performed from September 13, 2003 onward, regardless of when the franchise agreement was entered into.

Once the Court determines that a newly enacted statute affects a pre-existing contract, the Court must analyze "whether the state law has, in fact, operated as a substantial impairment of a contractual relationship." *Allied Structural Steel Co., v. Spannaus*, 438 U.S. 234, 244 (1978). Alliance points to the provision in the standard Agreement that reserves to the Manufacturer the right to price its vehicles. *Ford Sales and Service Agreement Standard Provisions*, para. 1.(f) ("DEALER PRICE" shall mean, with respect to each COMPANY PRODUCT to which it refers, the price to the Dealer for such product, *as from time to time established by the Company*. . .) & para. 10 ("The Company has the right at any time and from time to time to change or eliminate prices, charges, discounts, allowances, rebates, refunds or

other terms of sale affecting COMPANY PRODUCTS . . ."). Alliance argues that the impairment from pricing in Section 10 is substantial, because it limits its members' "pre-existing contractual right to price products that forms the foundation of a motor vehicle manufacturer's business strategy." *Def.'s Mem.* at 20.

The law requires more. To determine "substantial impairment," the statute must be analyzed in terms of whether the industry has been regulated in the past. *Energy Reserves Group*, 459 U.S. at 411; *Allied Structural Steel Co.*, 438 U.S. at 242, n. 13 (citing *Veix v. Sixth Ward Bldg. & Loan Assn.*, 310 U.S. 32, 38 (1940)) (stating "[w]hen he purchased into an enterprise already regulated in the particular to which he now objects, he purchased subject to further legislation upon the same topic.") In the words of Justice Holmes, "One whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the State by making a contract about them." *Hudson County Water Co. v. McCarter*, 209 U.S. 349, 357 (1908). Under this analysis, in the words of the First Circuit, the courts "look long and hard at the reasonable expectations of the parties." *Houlton Citizens' Coalition v. Town of Houlton*, 175 F.3d 178, 190 (1st Cir. 1999). It is to this end, the courts will examine "whether the parties operated in a regulated industry." *Id.*

Alliance cannot gainsay Judge Gene Carter's 1984 determination that since 1975 Maine has adopted "an extensive system of regulation of business practices between motor vehicle manufacturers, distributors, and dealers." *N.A. Burkitt, Inc. v. J.I. Case Co.*, 597 F. Supp. 1086, 1091 (D.C. Me. 1984). As part of this system of regulation, the warranty reimbursement area has been the subject of steadily increasing State restriction ever since then. In light of the extensive history, both legislative and judicial, this Court views with utmost skepticism Alliance's claim that the Section 10's prohibition against surcharges was "not foreseeable." *Def.'s*

Mem. at 20. Indeed, once it was judicially clarified that the Manufacturers could collect back their enhanced reimbursement costs by surcharging Maine vehicles, it was virtually inevitable this hole would be statutorily plugged.

In its Memorandum, Alliance cites the case of *Chrysler Corp. v. Kolosso Auto Sales, Inc.*, 148 F.3d 892, 895 (7th Cir. 1998) for the proposition that a "history of regulation is never a sufficient condition for rejecting a challenge based on the [C]ontracts [C]lause," because to find otherwise would permit a state to "decide to change the price in [the motor vehicle manufacturer's] contracts." But, in *Kolosso*, the Seventh Circuit affirmed a district court ruling that enforced new Wisconsin legislation allowing a dealer to challenge a manufacturer's refusal to permit relocation of a dealership and overriding a specific provision to the contrary in the franchise contract. Chief Judge Posner wrote "a contractual obligation is not impaired within the meaning that the modern cases impress upon the Constitution if at the time the contract was made the parties should have foreseen the new regulation challenged under the clause." *Chrysler*, 148 F.3d at 897. Since 1975, the state of Maine has required the Manufacturers to reimburse warranty claims at adequate and fair rates. From that time on, it was, in this Court's view, reasonable for the Manufacturers to expect that the Legislature would continue to regulate this part of the Manufacturer-Dealer relationship until this overall legislative goal was inescapable.

In his 1994 opinion, Judge Brody concluded that the 1991 statutory changes were within reasonable expectations, "at least as to those contracts entered into after 1975." *Acadia Motors*, 844 F. Supp. at 827. Although Alliance has submitted evidence of model franchise agreements, there is no evidence from which this Court can conclude that any of

the agreements pre-dated 1975.[6] Further, the Ford contracts, which Alliance counsel stated were representative, anticipate regulatory change, a factor the Supreme Court found significant in *Energy Reserves*.[7] 459 U.S. at 416 (stating "[m]oreover, the contracts expressly recognize the existence of extensive regulation by providing that any contractual

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[6] Following oral argument at which the State had pointed out that none of the original Agreements had been produced, Alliance move to supplement its declarations to provide further information about the franchise Agreements. The Court granted Alliance's motion over the objections of the Defendants and *Amicus Curias* "Plus." Alliance submitted specimen policies from three manufacturers, DaimlerChrysler, General Motors, and Ford through the Affidavits of Jane F. Steinmetz, William T. Hepburn, Jr., and Matt Falerios. There is no indication in any of the Affidavits that any of the current Maine Dealer Agreements pre-dated the Maine legislation in 1975.

[7] For example, the Ford documents contain references to the parties' understanding that the Agreement is subject to applicable law and the law may change during its term. The Ford Warranty & Policy Manual states that "No policy or procedure contained in the Warranty and Policy Manual is intended to be inconsistent with, or contrary to the Sales and Service Agreement or *state law*." The Ford Sales and Service Agreement provides that "Both parties recognize the rights of the Dealer and the Company under this agreement are defined and limited by the terms of this agreement *and applicable law*." In its Standard Provisions, Ford retains "the right to amend, modify or change this agreement in case of legislation, *government regulation or changes in circumstances beyond the control of the Company that might affect materially the relationship between the Company and the Dealer*." The Ford Standard Conditions mandate that the Dealer comply with "all applicable federal, state, and local law, rules and regulations in the ordering, sale and service of COMPANY PRODUCTS . . ., including without limitation those related to . . . customer service." There is no similar provision applicable to Ford.

terms are subject to relevant present and future state and federal law."). In sum, this Court concludes that Alliance's reasonable expectations have not been substantially impaired by the enactment of Section 10 of L.D. 1294. *Accord Acadia Motors*, 844 F. Supp. at 827.

Having found that the impairment of Section 10 was within the reasonable expectations of the parties, the Court need not to go further and examine whether the impairment "rests on, and is prompted by, significant and legitimate state interests." *Energy Reserves*, 459 U.S. at 416. However, the Court notes, in passing, that Judge Brody's opinion on this issue in 1994 is exactly applicable to the issue before the Court today. *Acadia Motors*, 844 F. Supp. at 827-28. Although the Manufacturers see the issue as mandating higher prices for out-of-staters, the Legislature is not compelled to view the policy question as the Manufacturers propose it. Instead, as Judge Brody concluded, the Maine Legislature is entitled to make a policy decision to respond to what it perceives as the disparity in bargaining power between Manufacturers and Dealers and to prevent Manufacturers, who have been "unwilling to pay the fair and full price for repairs made necessary when their automobiles failed to meet warranty stands," to force Dealers to shift costs of performing warranty work to nonwarranty customers. *Id.* at 828. This time dealing with Section 10 of L.D. 1294, this Court agrees with Judge Brody that the "Legislature's concern for protection of dealers and the public is a significant and legitimate public purpose" and that the means chosen by the Legislature to implement these purposes is also reasonable." *Id.*

B. Irreparable Harm

Finally, in the Court's view, Alliance's motion also clearly stumbles on the irreparable harm requirement. The First Circuit has interpreted Civil Rule 65(a) as placing the burden squarely on the movant to demonstrate that a denial of interim injunctive relief would cause irreparable injury.

Ross-Simons, 102 F.3d at 18. To be entitled to injunctive relief, the movant must demonstrate the inadequacy of legal remedies. *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982); *Ross-Simons*, 102 F.3d at 18-19; *Lopez v. Garriga*, 917 F.2d 63, 68 (1st Cir. 1990). To the contrary, Alliance has unequivocally demonstrated it has a vehicle for recoupment of monies its members will have lost if the statute is deemed unconstitutional. Its own member Ford Motor Company has successfully garnered $3.6 million from Maine dealers in the year 2002 alone by surcharging its dealers. Alliance has failed to demonstrate that this remedy would be unavailable to its members in this case.

Alliance argued it would be "unfair" if its members were to charge new car purchasers to make up for the loss of past surcharges. However, in the early 1990s, when Ford imposed the $160 surcharge on each new vehicle sold in Maine to recollect the higher warranty reimbursement mandated by Maine law, Ford simply assessed its surcharge on each Dealer's parts invoice in the month following the sale. It did so "without regard to whether the dealer actually performed warranty work in that month." *Acadia Motors*, 44 F.3d at 1052-53. The Dealers' claim that in some instances they paid more in surcharges than they received in increased reimbursement under the new policy did not impress Ford at the time. *Id.* at 1053 n. 6. Ford simply responded that the $160 figure was "calculated to recoup Ford's increased costs of doing business over time, spreading those costs evenly among the dealers." *Id.*

Having determined that Alliance has not met its burdens of establishing a likelihood of success on the merits and irreparable injury, the Court does not need to address the remaining tests under *Ross-Simons*.

III. Conclusion

The Alliance of Automobile Manufacturers' Motion for Preliminary Injunction is DENIED for the reasons set forth above.

APPENDIX D

No. 05-1259

United States Court of Appeals
For the First Circuit

ALLIANCE OF AUTOMOBILE MANUFACTURERS
Plaintiff – Appelant,

v.

DAN A. GWADOSKY, in his official capacity as Secretary of State of the State of Maine, and G. STEVEN ROWE, in his official apacity as Attorney General of the State of Maine,
Defendants – Appellees.

Before

Coffin, *Senior Circuit Judge*,
Torruella and Selya, *Circuit Judges*,
Lipez and Howard, *Circuit Judges*,

ORDER OF COURT

Entered: December 15, 2005

The panel of judges that rendered the decision in this case having voted to deny the petition for rehearing and the suggestion for rehearing en banc having been carefully considered by the judges of the Court in regular active service and a majority of said judges not having voted to order that the appeals be heard or reheard by the Court en banc,

It is ordered that the petition for rehearing and the suggestion for rehearing en banc, be *denied.*

By the Court:
RICHARD CUSHING DONOVAN, Clerk

By: */s/ RICHARD CUSHING DONOVAN*
Clerk

APPENDIX E

Civil No. 03-154-B-W

United States District Court
District of Maine

ALLIANCE OF AUTOMOBILE MANUFACTURERS
Plaintiff,

v.

DAN A. GWADOSKY, in his Official Capacity as Secretary of State of the State of Maine, and G. STEVEN ROWE, in his Official Capacity as Attorney General of the State of Maine,
Defendants.

JUDGMENT

In accordance with Judge John A. Woodcock, Jr.'s Order on Cross-Motions for Summary Judgment of January 25, 2005, judgment is hereby entered in favor of Defendants Dan A. Gwadowsky, in his official capacity as Secretary of State of the State of Maine, and G. Steven Rowe, in his official capacity as Attorney General of the State of Maine and against Plaintiff Alliance of Automobile Manufacturers.

WILLIAM S. BROWNELL, CLERK

By: */s/ ELIZABETH RICHARDSON*
Deputy Clerk

Dated: January 26, 2005

APPENDIX F

Title 10, Maine Revised Statutes

§1176. Warranty

If a motor vehicle franchisor requires or permits a motor vehicle franchisee to perform labor or provide parts in satisfaction of a warranty created by the franchisor, the franchisor shall properly and promptly fulfill its warranty obligations, in the case of motor vehicles over 10,000 pounds gross vehicle weight rating, shall adequately and fairly compensate the franchisee for any parts so provided and, in the case of all other motor vehicles, shall reimburse the franchisee for any parts so provided at the retail rate customarily charged by that franchisee for the same parts when not provided in satisfaction of a warranty. Further, the franchisor shall reimburse the franchisee for any labor so performed at the retail rate customarily charged by that franchisee for the same labor when not performed in satisfaction of a warranty; provided that the franchisee's rate for labor not performed in satisfaction of a warranty is routinely posted in a place conspicuous to its service customer. A franchisor is not required to pay the price charged by the dealer to retail customers for parts of systems, appliances, furnishings, accessories and fixtures of a motor home as defined in Title 29-A, section 101, subsection 40 that are designed, used and maintained primarily for nonvehicular residential purposes. Any claim made by a franchisee for compensation for parts provided or for reimbursement for labor performed in satisfaction of a warranty must be paid within 30 days of its approval. All the claims must be either approved or disapproved within 30 days of their receipt. When any such claim is disapproved, the franchisee that submitted it must be notified in writing of its disapproval within that period, together with the specific reasons for its disapproval. No franchisor may, by agreement, by restriction upon reimbursement, or otherwise, restrict the nature or extent of labor performed or parts provided so that such restric-

tion impairs the franchisee's ability to satisfy a warranty created by the franchisor by performing labor in a professional manner or by providing parts required in accordance with generally accepted standards.

In any claim that is disapproved by the manufacturer, and the dealer brings legal action to collect the disapproved claim and is successful in the action, the court shall award the dealer the cost of the action together with reasonable attorney fees. Reasonable attorney fees shall be determined by the value of the time reasonably expended by the attorney and not by the amount of the recovery on behalf of the dealer.

It is unlawful for a franchisor, manufacturer, factory branch, distributor branch or subsidiary to own, operate or control, either directly or indirectly, a motor vehicle warranty or service facility located in the State except on an emergency or interim basis or if no qualified applicant has applied for appointment as a dealer in a market previously served by a new motor vehicle dealer of that manufacturer, factory branch, distributor branch or subsidiary's line make.

APPENDIX G

L.D. 1294

An Act To Amend the Motor Vehicle Franchise Law

Be it enacted by the People of the State of Maine as follows:

Sec. 10. 10 MRSA § 1176, first ¶, as amended by PL 1995, c. 65, Pt. A, § 16 and affected by § 153 and Pt. C, § 15, is further amended to read:[1]

If a motor vehicle franchisor requires or permits a motor vehicle franchisee to perform labor or provide parts in satisfaction of a warranty created by the franchisor, the franchisor shall properly and promptly fulfill its warranty obligations, in the case of motor vehicles over 10,000 pounds gross vehicle weight rating, shall adequately and fairly compensate the franchisee for any parts so provided and, in the case of all other motor vehicles, shall reimburse the franchisee for any parts so provided at the retail rate customarily charged by that franchisee for the same parts when not provided in satisfaction of a warranty. A franchisor may not otherwise recover its costs for reimbursing a franchisee for parts and labor pursuant to this section. For purposes of this section, the retail rate customarily charged by the franchisee for parts may be established by submitting to the franchisor 100 sequential nonwarranty customer-paid service repair orders or 60 days of nonwarranty customer-paid service repair orders, whichever is less in terms of total cost, covering repairs made no more than 180 days before the submission and declaring the average percentage markup. The average percentage markup so declared is the retail rate, which goes into effect

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[1] Additions to 10 M.R.S.A. § 1176 are indicated by Underlining; deletions from the statute are indicated by Strikethrough.

30 days following the declaration, subject to audit of the submitted repair orders by the franchisor and adjustment of the average percentage markup based on that audit. Only retail sales not involving warranty repairs, not involving state inspection, not involving routine maintenance such as changing the oil and oil filter and not involving accessories may be considered in calculating the average percentage markup. A franchisor may not require a franchisee to establish the average percentage markup by an unduly burdensome or time-consuming method or by requiring information that is unduly burdensome or time-consuming to provide, including, but not limited to, part-by-part or transaction-by-transaction calculations. A franchisee may not change the average percentage markup more than 2 times in one calendar year. Further, the franchisor shall reimburse the franchisee for any labor so performed at the retail rate customarily charged by that franchisee for the same labor when not performed in satisfaction of a warranty; ~~provided that~~ as long as the franchisee's rate for labor not performed in satisfaction of a warranty is routinely posted in a place conspicuous to its service customer. A franchisor is not required to pay the price charged by the dealer to retail customers for parts of systems, appliances, furnishings, accessories and fixtures of a motor home as defined in Title 29-A, section 101, subsection 40 that are designed, used and maintained primarily for nonvehicular residential purposes. Any claim made by a franchisee for compensation for parts provided or for reimbursement for labor performed in satisfaction of a warranty must be paid within ~~30~~ 60 days of its approval. All the claims must be either approved or disapproved within ~~30~~ 60 days of their receipt. A claim may be submitted within 90 days after the performance of services. When ~~any such~~ a claim is disapproved, the franchisee that submitted ~~it must~~ the claim must be notified in writing of ~~its~~ the claim's disapproval within that period, together with the specific reasons for its disapproval. ~~No~~ A franchisor may not, by agreement, by restric-

tion upon reimbursement, or otherwise, restrict the nature or extent of labor performed or parts provided so that such restriction impairs the franchisee's ability to satisfy a warranty created by the franchisor by performing labor in a professional manner or by providing parts required in accordance with generally accepted standards.